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No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GONZALEZ TRADING, INC.,
JOSE M. BAEZA, JR.,

Petitioners,

v.

YALE MATERIALS HANDLING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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76 pp

QUESTIONS PRESENTED

I. Whether a new federal subject matter jurisdiction is to be created under "estoppel" and "waiver" theories that are inconsistent not only with the facts established on the face of the Magistrate Judge own order, but are to henceforth affect the limited jurisdiction of Courts of the United States which are to become instead courts of general common law jurisdiction under non-constitutional judges.

II. Whether the total factual absence in the record of a clear and unambiguous "consent" to a Magistrate Judge may be found under new or substituted federal appellate factual findings to occur ex-post-facto in the course of appellate proceedings absolutely without the "consent" of the party itself, all of which outside the scope of 28 U.S.C. § 636(c).

III. Whether a federal Appellate Court may properly hold in abeyance during more than 3 years and after endless challenges to its own lack of federal subject matter jurisdiction.

IV. Whether an Article III Judge may refer a civil case to a Magistrate Judge without ever seeing or even receiving the prior informed and unambiguous written "consent" of all parties involved in the litigation, as required under 28 U.S.C. § 636(c).

V. Whether a federal Court of Appeals may ignore that a severed trial has not been held in the case when the Magistrate Judge himself has denied having celebrated such severed trial, and the record shows that Petitioners trial has never taken place, and which documentary fact in the record proves the lack of federal subject matter jurisdiction both at the Magistrate Judge level as well as at the Appellate Court level.

VI. Whether there is a final judgment in this case when one of the principal parties severed counterclaim jury trial has yet to take place, in the light of Fed. Rul. of Civ. P.54(b).

Certificate of Interested Parties

America Discount, Inc.

Joe's Rental, Inc.

José M. Baeza, Jr.

Franchel Enterprises, Inc.

GT Americas, Inc.

GT Corporation

General Trading, Inc.

Goná Trading, Inc.

Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

Hyster-Yale Materials Handling, Inc.

NACCO Industries, Inc.

NACCO Materials Group, Inc.

Power Depot, Inc.

Yale Material Handling Corporation

Barnett Bank of Broward County

Cía Dominicana de Teléfono C x A

First Florida Savings Bank, FSB

G.T.E. International

Vartex Limited

World Art Foundation Limited

Richard Bandler, Inc.

International Brokerage, Inc.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER 1997 TERM

GENERAL TRADING, INC.

Plaintiff-Counterdefendant,

v.

YALE MATERIALS HANDLING CORPORATION,

Defendant-Counterclaimant-Respondent,

GONZALEZ TRADING, INC.
JOSE M. BAEZA, JR.

Counterdefendants-Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

This petition by José M. Baeza, Jr. (Baeza, Jr.) and González Trading, Inc. (González) is for the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment and opinion entered on August 22, 1997 and for additional relief vacating such judgment. A timely rehearing *en banc* motion was denied by the Court of Appeal on October 29, 1997. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPINION OF THE APPELLATE COURT

The reported opinion issued below is **Appendix "A"**, infra. The pertinent page of a Magistrate Judge September 30, 1992 Order appears at **Appendix "B"**. The Judgment encompassing such order is **Appendix "C"**.

REASONS FOR GRANTING THE WRIT

1. The Vital Separate Federal System and Long Enduring Limited Jurisdiction of Federal Courts is to be Discarded by a New Estoppel and Waiver Magistrate Judge Made Federal Subject Matter Jurisdiction.

2. The Decision Below Conflicts with the Appellate Courts Own Prior Decisions and the Decisions of All Other Courts of Appeal as to the Proper Interpretation of 28 U.S.C. § 636(c).

STATEMENT OF THE CASE

On September 30, 1992, a Magistrate Judge entered an order-opinion purporting to complete the 13 day trial of a case

that had been suddenly left unfinished by a District Court Judge. Hon. Thomas E. Scott, who abruptly resigned from the bench but ordered that a new trial be had in this case by a successor Judge and further ruled that it be a jury trial.

Thus, on September 30, 1992, the Magistrate Judge referred to Petitioner's separate trial "order" in a special footnote. In unequivocal language the Magistrate Judge stated:

> "On December 29, 1988, the Court granted counterdefendant José M. Baeza, Jr's, motion for severance on court III of the counterclaim and ordered that trial on issues involving this counterdefendant would be conducted following the trial of the main case. Accordingly, Yale shall have the right to request a trial date for this party within thirty (30) days of the date of this Memorandum Opinion and Order." (September 30, 1992 Magistrate Judge Order-Opinion) (Underline ours, marked infra as Appendix "B").

It was a fact to the Magistrate Judge that the counterclaim trial of Petitioner José M. Baeza, Jr. (Baeza, Jr.) is still to be had and said trial remains pending. In this manner it was also acknowledged by the Magistrate Judge that the counterclaim trial of Petitioner Baeza, Jr., did not take place within the "main case", and that said trial was to be separately adjudicated, as he himself stated in such footnote. The severed trial of Appellant Baeza, Jr. has never taken place. The Magistrate Judge's own factual determination, on the lack of a judgment over Petitioner's counterclaim is a documentary event in this

case and is an unequivocal matter in this record, as shown in attached **Appendix "B"**.

The "pending trial footnote reservation" expressly made at page 18 of the September 30, 1992 "Order" (**Appendix "B"**) not only had to prove unequivocally to the Court of Appeals that Petitioner Baeza, Jr. never enjoyed his right to such trial by jury, but also absolutely proved the lack of jurisdiction defect existing which made null and void all subsequent proceedings before such Magistrate Judge. It is therefore an evidenciary fact documented in the court's own papers of this case, which prove that Petitioner Baeza, Jr., never gave his "consent" to the Magistrate Judge to act as an Article III District Court Judge. Baeza Jr's attorney at the time [Ms. Rub], did not "consent" to completion of a "joint bench" trial before such Magistrate Judge. There was no need therefore for the Magistrate Judge to make the trial-saving specific footnote other than the fact that Petitioner Baeza, Jr. had not "consented" to his acting, and Petitiioner Baeza, Jr., never filed in writing any such consent, and that his severed counterclaim jury trial was still to be had. No joint final adjudication, or even a separate one, was ever made by the Magistrate Judge, before or after his said September 30, 1992 "order", to include Petitioner's counterclaim trial in addition to or as part of the trial work of former District Court Judge Thomas E. Scott. There is no final judgment covering "all" the parties in this case under Fed. Rul. of Civ. P.54(b). There is no final judgment to cover the still pending counterclaim trial of Petitioner Baeza, Jr.

When Respondent YALE's hidden secret on the lack of consent, and the also pending counterclaim trial which was claimed two years later, prior to finding the non-transcribed tape (of a status conference held on November 20, 1992), and

asserting lack of federal subject matter jurisdiction, YALE acknowledged such vital deficiency but decided to characterize the challeged missing "consent" event merely as "an innocent omission". On other occassions, Respondent YALE resorted to calling the missing "consents" a simple "typographical error" allegedly corrected by one of its attorney's previous questioning Petitioner Baeza, Jr's former attorney, Ms. Rub, before the Magistrate Judge. But such after-thoughts theory of Respondent was invented when the said tape was transcribed two years later. Yet such theory overlooks the totally contrary Magistrate Judge written admision which is disclosed by the counterclaim-trial-saving-footnote. **Appendix "B"**, infra.

Notwithstanding such clear and unambiguous lack of "consent", and lack of federal subject matter jurisdiction, as proven by the footnote, a District Court Judge on October 24, 1994, entered an order relative to Petitioner's motion to vacate all judgments for lack of federal subject matter jurisdiction on the conditional referral order it had made to assign the case to the said Magistrate Judge. The "curing" order issued on October 24, 1994 contained "fact findings" to provide *ex-post facto* support describing part of the conduct of the parties for the purported existence of a never heard in-the-alternative federal subject matter jurisdiction. There were made ten (10) pages of such "conduct findings". These "estoppel", "waiver" fact findings were ordered by the same District Court to be filed within the main case in a pending appeal before the Eleventh Circuit Court of Appeals. The never-heard in-the-alternative assertion of federal subject matter jurisdiction was to be an ad hoc clarification supplied by the same District Court Judge for the Court of Appeal's use in the event that his conditional order of referral were found to be null and void. The appellate opinion below was rendered 3 years after Petitioner made a motion challenge to the lack of appellate

federal subject matter jurisdiction and renewed his claim and right to trial on his severed counterclaim, and which motion is said to be resolved at the very end of the Court of Appeals opinion, after the said Court set forth at great length the Magistrate Judge factual findings and adjudications. **(Appendix "A").**

The Court of Appeals states:

> "At the same time that Baeza, Jr. and González Trading filed their motion with the magistrate judge to determine whether he had jurisdiction, they also filed a motion with the district court to vacate the order of referral. On October 24, 1994, the district court issued an order denying Baeza, Jr. and González's motion. In the order, the district court dismissed the motiom for lack of jurisdiction because the issue of the magistrate judge's authority at that time was pending on appeal to this court. In the alternative, the district court found that Baeza, Jr. and González Trading had consented to the magistrate judge's authority pursuant to 28 U.S.C. § 636(c)." (Emphasis ours) (119 F.3d at p. 1493 (1997).

On October 11, 1994 the Court of Appeals refused to examine its own lack of federal subject matter jurisdiction which depended on whether the Magistrate Judge had jurisdiction when it issued its "judgments". After 5 months of Petitioner detailed challenge to jurisdiction over the pending appeal, the Court of Appeals merely entered an order stating that it would carry such motion "with the case". Petitioner filed for Mandamus over the October 24, 1994 "federal

jurisdiction in the alternate orfer" but Mandamus was denied by the Appellate Court for lack of jurisdiction. After 3 years without any ruling on the vital challenge of its own subject matter jurisdiction the Court of Appeal "found facts" for the missing statutory "consents" based only on conduct of the parties or their attorneys and entered simultaneously a decision "on the merits" of appeals with briefs that had been discarded by their own appellants and on facts that Petitioner did not discuss at oral argument because of the lack of jurisdiction. The Court of Appeal did refer to Petitioner's 3 year old motion challenging jurisdiction. That reference is made at the end of the opinion and in the last footnote No. 47. There it is stated that such motion challenging appellate jurisdiction had been decided under its previous Section V (A) of the opinion (Appendix "A" at page 1505). During the 3 year span, Petitioner had filed endless appeals on numerous decisions of the Magistrate Judge and which appeals were denied for lack of jurisdiction. Petitioner was also subjected to Appellate Court ordered contempt proceedings before the District Court Judge for not having been willing to pay the judgments of the Magistrate Judge. To prevent incarceration on the heavy fines imposed, Petitioner was compelled to file even double supersedeas for over 4 million dollars. The Appellate Court in sight of the posting of such doubled supersedeas filings, and 3 years having gone by, decided to rule on the lack of subject matter jurisdiction and the missing factual "consents". The Appellate Court erroneously decided to find its own facts on appeal and to substitute the jurisdictional "waiver", "estoppel" Magistrate Judge May 23, 1994 findings of fact with new 1997 Appellate Court "waiver", "estoppel" findings.

In simple terms, what is factually presented in this remarkable case is that the Magistrate Judge ruled in 1994 and the Court of Appeals agreed in 1997, that the Magistrate

Judge had all along federal subject matter jurisdiction and that it was correct for the Magistrate Judge to deny the motion to vacate the referral because Petitioners had, by the same "waiver", and "estoppel" theory and by their conduct consented to the Magistrate Judge's jurisdiction due to their "silence". The Magistrate Judge had thus foreordained, on May 23, 1994, the denial of Petitioner's motion to vacate non-final and non-article III judgments. For such self-serving jurisdictional subject matter purposes the Magistrate Judge did specifically determine, on May 23, 1994, that after the District Courts conditional "referal", Petitioner Baeza, Jr., had somehow "consented" by keeping silent to the reference when the District Judge had given 7 days to object to such referral. But the documentary facts show the facts to be otherwise due to the tale-telling footnote in Appendix "B". But in such last minute and appellate factual "silent consent" theories, as now adopted by the Appellate Court, not a word appears of the written order of September 30, 1992 as issued by Magistrate Judge severed trial footnote. The Petitioners "consent" is now made and supported by appellate federal subject matter jurisdiction findings. Such expansion of federal jurisdiction is made entirely under theories of "waiver" "and inferences", not by any affirmative action of Petitioners. Alluding to an inference of "consent" by Baeza, Jr., at page 5, of the October 24, 1994 order, to somehow support federal subject matter jurisdiction "in the alternative", the District Court below had previously described some "factors" that purportedly led to such inferences. But those ad hoc procedures were most erroneous due likewise to the existence of the pending counterclaim jury-trial-footnote that had been previously made on September 30, 1992 by the Magistrate Judge himself, on his personally stated knowledge of events, as he had stated at the November 20, 1991 conference and which was the reason that made him so determine the September 30, 1992 footnote. The Court of Appeals, in making the same factual error, as previously made

by the District Court in October 24, 1994, factually overlooked the same documented footnote. The Appellate Court likewise also erroneously cited to selected specific portions of the same tape that had not been transcribed for 3 years and had never been even heard by the District Judge or by the Appellate court. The selected portion of the November 20, 1991 tape, used by the Appellate Court, is as follows:

> MR. ALLEN: Your Honor, I just wanted to ask, perhaps it's a convenient time, if Mrs. Rub on behalf of Mr. Baeza, Jr. would be inclined to consent that the bench trial with respect to José Baeza, Jr., would proceed in front of your Honor as well, would consent to a reference for that purpose also?
>
> MRS. RUB: I don't think we have any problem with that. I think that's fine. (Emphasis ours). (D.E. 1036 at 19).

However what the 3 year old trancription did most clearly point out was that a statutory 28 U.S.C. § 636(c) lacking "consent" was being discussed before a Magistrate Judge, not before the absent and later "referring" Article III judge. The further fact is that in such manner the event of the missing "consents" of Petitioiners was recorded for posterity. Its absence produced the September 30, 1992 saving-of-Petitioner's Baeza, Jr. trial-footnote. **Appendix "B"**. It is most clear that such a situation may hardly be deemed to be an "innocent omission" as was later desperately called by Respondent YALE's two attorneys who had been present before the Magistrate Judge. It is also clear that if it was the missing "consents" that were being procured, and such inquiry was being made, the same was not for "correcting" simple errors in

typing, such as not placing two names, that of González Trading, Inc., and that of Petitioner Baeza, Jr., in the November 20, 1991 "stipulation". Such vital subject matter omission and the issue of the two missing "consents" was then indeed a matter fully known by not one, but by two attorneys for Respondent YALE who had been present at the time of the recording of the November 20, 1991 tape. Neither one of YALE's two attorneys made any effort during the ensuing two years, to disclose their knowledge on the lack of jurisdiction of the Magistrate Judge due to the two missing "consents". The same two attorneys did not utter either a single word on the whereabouts of the "consent" of Richard Bandler & Co.,[1] a party they also represent in this case and which has never been the object of any judgment by the Magistrate Judge.

The factual documentary record, as is disclosed by the pleadings in this case, to be considered in this petition, plainly and facially shows that less than "all" the parties "consented" to the Magistrate Judge acting as an Article III District Judge. The lacking "consents" however are established by the Appellate Court under its new appellate factual findings. But the Appellate Court did not do such fact finding to review its subject matter jurisdiction when the first appeal was filed. Review of its own jurisdiction was not made either when it ruled on August 27, 1993 and reversed a stay order of execution

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[1] Bandler & Co., was one of the three petitioners in bad faith involuntary bankruptcy proceeding that were forced upon General Trading, Inc., and which failed effort resulted in a published adjudication against YALE which is reported at 87 B.R. 217 (S.D. Fla. 1988). Never in the record of this case does it appear that such Bandler party consented to the Magistrate Judges acting. That "consent" was provided by Yale's attorney on the Appeal before the 11th Circuit. The appellate opinion calls the Bandler's party lack of statutory "consent" argument to be without merit and warranting no discussion 119 F.3d at 1495, n.19.

issued by the same Magistrate Judge. The record also shows that the order of referral entered by the District Court on November 27, 1991 was on its face a "conditional" order non-conforming in the least with the statute under which it was being issued. That is so because on its very face it has a stated coercive "waiver" penalty to be imposed on all non-consenting parties to such ad hoc Magistrate Judge "referral". These non-statutory coercive referral procedures were therefore, from their very face, improper because of being issued against the very specific Congressional statutory language found in 28 U.S.C. 636(c) which strictly requires "voluntary consent", among other things.

The Court of Appeals, after the said 3 year period, erroneously found new facts in this case, not on a "clear error" review de novo, but by making findings of fact that are new and contrary to what appears in the documented record of this case. Specifically, they are facts that controvert and totally negate what was footnoted by the Magistrate Judge on Petitioners severed trial still to be had, as such matter stood on September 30, 1992. It is in that appellate factual post[illegible] that Petitioner's "consent" was now changed by the Appellate Court for the Magistrate Judge below to ex-post facto fede[illegible]ubject matter jurisdiction. The Appellate Court states:

> "On November 20, 1991, the attorneys for Yale, as well as the attorneys for GTI, González Trading, Baeza, Sr., Javier Baeza, and Baeza, Jr., attended a status conference before United States Magistrate Judge Ted. E. Bandstra, and presented a signed consent to the completion of the trial before a United States magistrate judge, pursuant to 28 U.S.C. § 636(c). At the conference, the attorneys stipulated to proceed in the

> manner provided by Amended Rule manner provided by Amended Rule 63 of the Federal Rules of Civil Procedure. The preamble of the consent and stipulation listed GTI, Baeza, Sr., Javier Baeza and Yale, and the signature of these parties' attorneys appeared at the end of the document. After receiving the consent and stipulation, the magistrate judge stated that "apparently there is an agreed consent to have this case now be completed, not restarted, but completed before me. Is that correct?" Yale's attorney responded in the affirmative; no party objected to the magistrate judge's statement regarding consent." (emphasis ours) (119 F.3d 1490, 1491).

The Court of Appeals finds further documentary facts as follows:

> González Trading was not specified in the preamble; however, that company' s attorney, as well as its corporate agent, Baeza Sr., was present at the status conference. In addition, Baeza, Jr. was not listed in the preamble of the consent and stipulation. At the status conference, the magistrate judge asked Baeza, Jr.'s attorney whether Baeza, Jr. would consent to reference of the completion of the bench trial before him. His attorney answered, "I don't think we have any problem with that. I think that's fine". (119 F.3d at 1491).

But the appellate "fact finding" is most erroneous, not only because the transcript on the record does not show Baeza, Sr.

being present at such conference, nor because of the Magistrate Judge asking any such question, but most important, for federal subject matter purposes, because on the previous transcript page [18] there are correct procedural events as follows:

"THE COURT: 10 at--we'll just figure a 9 o'clock starting time for that.

Yes.

MRS. RUB: Your Honor, there was an order in December of '88 by Judge Scott which severs Count 3. I don't know if we should discuss that right now, but I just wanted to make clear that José M. Baeza, Jr. is not required to attend the trial and then there will be a bench trial, 30 to 60 days after the completion of this trial, depending on what happens.

MR. ALLEN: That's correct, your Honor. We agree with that. The only count against Mr. Baeza, Jr. relates to fraudulent conveyances. Count 3 has not been severed as to José Baeza, Sr. and Javier Baeza, but it has been as to Manny Baeza.

THE COURT: I'm assuming that --and I do remember that severance from the prior time that I looked at this case-- I'm assuming that all of those efforts, and because I'm now trying the case I'm not going to get involved with any settlement conferences in the case, but I would encourage it if that's possible and I would'n be

> disappointed if the case were to settle, and I'm assuming that right now you're not looking at a potential settlement in the case, sometimes a trial date affects that, but in this case it's already been to trial, so I do anticipate a trial in this case. (Underline ours).

In further discussing the issue of "consent" as a requirement for the existence of Federal subject matter jurisdiction pursuant to 28 U.S.C. § 636(c), the Court of Appeals goes on to also erroneously note that "consent" appeared at the November 20, 1991 "status conference" before the Magistrate Judge. The Appellate Court thus "finds" that "consent" is to be inferred from the mere presence of attorneys at a "status conference" before a non-Article III Magistrate Judge.

In a separate footnote over these same findings of fact, the Court of Appeals acknowledges however that there was no written consent of the Petitioner at the "status conference" before the Magistrate Judge. It had to recognize that there has never appeared in the record of this case the missing written consent of the Petitioner:

> 8. The magistrate judge requested that Baeza, Jr.'s attorney put his oral consent in writing subsequent to the conference; however, written consent was never forthcoming." (emphasis ours)

But all such factual appellate conclusions overlook the fact that there were two separate trials to be had, and the second trial is the one that is referred to at page 18 of the November 20, 1991 transcript. That is the severed trial of Petitioner Baeza Jr. That is the still pending severed second trial that the

Magistrate Judge himself acknowledged in his September 30, 1992 footnote and which has not yet taken place. It is in a subject matter limbo at present. The outstanding Fed. R. of Civ. P.54(b) finality requirement was thus also erroneously ignored by the Court of Appeals in its appellate new fact-finding endeavors.

It must be noted at this point, that it is not merely a "written consent" what has never been forthcoming in this case, (for "consent" of the attorney had supposedly already been given in the appellate facts), but it is a fact that the "consent" of the Petitioner, as a party, was neither in the record for the District Court Judge to enter a conditional order of referral. Petitioners "consent" was neither in writing nor orally, for the November 20, 1991 tape was not transcribed for a period 3 years and filed on May 19, 1994. Moreover, the Magistrate Judge's footnote (**Appendix "B"**) proves that Petitioner never consented to have his trial counterclaim be heard by the said non-Article III Magistrate Judge. The Magistrate Judge understood Petitioner's consent as not having been given. **Addendum "B"** unequivocally shows that fact because of the footnote. With Petitioner's severed trial and his counterclaim still pending, the interlocutory judgments entered by the Magistrate Judge fail to meet the requirements of Fed. R. of Civ. P. 54(b). Such jurisdictional facts affected most clearly the Court of Appeals own appellate jurisdiction which had been expressly challeged by a motion of Petitioner filed on May 9, 1994 and which motion is referred to in footnote 47 of the appellate opinion. The Court of Appeals decision has changed those facts. It has now reversed the "saving-of-the-jury-trial-footnote" of the Magistrate Judge. Petitioner's said trial is clearly referred in the footnote attached hereto as Addendum "B". The footnote is eliminated on appeal by application of "estoppel" and "waiver" common law theories that the District Court and the

Court of Appeals now have adopted for ex-post-facto appellate "finding" of Petitioner's silent "consent" to produce the "alternate" federal subject matter jurisdiction which at the same time is to evaporate Petitioner's pending severed trial. It is then more than clear and apparent from the very record of this case that "all" parties never gave a joint "clear and unambiguous" consent to a Magistrate Judge's acting under Article III of the Constitution. Such consent, for constitutional validity, was absolutely required as is acknowledged in the Appellate Court's own opinion:

> "In order for a magistrate judge to oversee any or all proceedings in a nonjury civil matter, and to order the entry of judgment in the case, 28 U.S.C. § 636(c) requires the "consent of the parties." n17 This court has held that "consent must be "clear and unambiguous,' and cannot be inferred from the conduct of the parties." Hall v. Sharpe, 812 F.2d 644, 647 (11th Cir.1987) (citing Adams v. Heckler, 794 F.2d 303, 307 (7th Cir.1986), and cases collected therein). (119 F.3d at 1494).

ARGUMENT

What evidence is there in the record of this case that the Petitioner consented to the jurisdiction of a Magistrate Judge? Is the two year "silence" of a party to become ex-post facto evidence of a "clear and unambiguos consent"? Is the mere conduct of an attorney being present at a status conference proceeding, evidence that the party itself consented to have a severed trial afterwards take place before the same Magistrate Judge? How may a non-final Magistrate Judge partial

Judgment evolve into a final one without Petitioners second severed counterclaim trial ever taking place? How did the Appellate Court accomodate the strict requirements of Fed. R. of Civ. 54(b) and 28 U.S.C. § 636(c) for its subject matter jurisdiction to exist as it had previously required in *Hall v. Sharp, supra.*, for a clear and unambiguous "consent" to be found in the record, with the opposite facts and new circuit law for subject matter jurisdiction to exist by "waiver" as held in this case? These are some of the reasons why Petitioners believe the issuance of a writ of certiorari is proper in this case. More so because the 11th Circuit Court of Appeals previous case law is followed in other Circuits, i.e., *Reiter v. Honeywell*, 104 F.3d 1071 (8th Cir. 1997). Such case law has also been cited with approval by this Honorable Court as well. See *McCarthy v. Bronson*, 500 U.S. 136, 111 S. Ct. 1737 (1991). As stated by the Court of Appeals below:

> "After carefully reviewing the record, we readily conclude that there is ample evidence that GTI, Baeza, Sr., Gonzalez Trading, and Baeza, Jr. explicitly and unambiguously consented to appear before the magistrate judge. First, the attorneys for all four of these parties attended a status conference on November 20, 1991, where they [the attorneys] presented to the magistrate judge a signed consent and stipulation to proceed before the magistrate judge to complete the trial" (emphasis ours). (119 F.3d at 1495).

Yet nowhere in the appellate decision is Fed. R. of Civ. P. 54(b) even mentioned. It could not be otherwise because all the Magistrate Judge multimillion dollar judgments would become at least-non-final and non-appealable. Moreover there is no evidence in the record that the Petitioner ever consented

to the jurisdiction of said Magistrate Judge in a voluntary and unambiguous manner, much less that his attorney's conduct (by simply being there) did not preserve for him the right to his trial. Next, the Appellate Court states that:

> "While the preamble to the consent and stipulation only named Yale, GTI, and Baeza, Sr., and did not list Baeza, Jr. or Gonzalez Trading, their consent was clearly conveyed at the November 20, 1991, status conference. When Baeza, Jr.'s attorney was asked by the magistrate judge whether his client would consent to the completion of the trial before a magistrate judge, he answered, "I don't think that we have any problem with that. I think that's fine." Because "there is no requirement [in § 636(c)] ... that the consent to referral to a magistrate be in writing, [but] only that it be express and on the record," Baeza, Jr. clearly consented. *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir.1987); *King v. Ionization Intern., Inc.*, 825 F.2d 1180, 1185 (7th Cir.1987). With respect to Gonzalez Trading, even though it was omitted from the preamble of the written document, its attorney signed the consent. More important, the initial focus of the status conference was to ensure that there was proper consent to try the case before the magistrate judge. (emphasis ours) (119 F.3d at 1495).

Again the Appellate Court's fact finding is most erroneous. Where are all the parties consenting in the appellate forum to the Magistrate Judge's Article III jurisdiction? Where in the record, written or otherwise, has such consent ever been given

by Petitioner? The appellate "ample evidence" to be found is reduced to "consent by inferences of silence" to arise out of the partie's attorney physical presence at the "status conference" to support the "referral". Mrs. Rub's comments certainly can not be thus interpreted because she had required the severed trial, which latter request produces the September 30, 1992 footnote as made by the Magistrate Judge himself. More to the point. The factual new "consent", as found by the Court of Appeals, is then one that was not on the record. It was to be found, in arguendo, within a stenographer's non-transcribed tape which was filed in this case two years post the judgments issued by the Magistrate Judge. But the Magistrate Judge's own footnote (**Appendix "B"**) refutes all such new appellate findings since the Magistrate Judge never received the written consent that he had asked for and he acknowledged Petitioner's right to the severed trial by making the footnote. Hence, the novel appellate fact finding process is most erroneous. In any event from a legal point of view appellate courts are not authorized to engage in making fact findings to substitute those made at the trial level, because such appellate courts are not designed to be trier of facts. See: *Irish v. United States*, 225 F.2d 3, (9th Cir. 1955); *Lundgreen v. Freeman*, 307 F.2d 104 (9th Cir. 1962). An appellate court may neither make findings of fact on its own account. *Waialva Agr. Co. v. Maneja* 178 F.2d 603 (9th Cir. 1949). Such fact finding, asides from being erroneous, in federal subject matter jurisdiction runs afoul of this Court's unequivocal decision in *Caterpillar v. Lewis*, 117 S. Ct. 467 (1996), which reaffirmed the rule requiring for the federal courts a firm, final judgment rule. In this case the appellate decision rendered below, asides from discarding the more than 200 years old limited jurisdiction of a federal forum, makes all statutory 28 U.S.C. § 636(c) violations disappear into an unconstitutional limbo together with Petitioner's as yet untried counterclaim pending against Respondent YALE.

The Court of Appeals dramatically took more than 3 years after its own subject matter jurisdiction was challenged, on May 9, 1994, all of which notwithstanding the on the record pending severed trial of Petitioner, as preserved by the September 30, 1992 footnote (**Addendum "B"**). Notwithstanding the existence of such fact and the disclosed knowledge of Petitioner's pending counterclaim trial, and which knowledge was spelled out in Mrs. Rub's open request, as shown in the foregoing trascribed portion of the November 20, 1994 status conference transcript. That ignored severed trial jurisdictional fact is likewise totally ommitted in the Appellate Court's "fact findings" designed to somehow support its own federal subjec matter jurisdiction thru "estoppel" and "waiver" theories. The appellate court states:

> All parties were present; as to Gonzalez Trading, not only was its counsel present, but also present was Bacza, Sr., its president, principal shareholder and corporate agent. With all parties thus present and the consent issue expressly on the table, the magistrate judge stated on the record that: "apparently there is an agreed consent to have this case now to be completed ... before me. Is that correct?" Yale's attorney answered in the affirmative, clearly expressing the view of all present. We conclude that there was explicit and unambiguous consent by all present. (emphasis ours) (119 F.3d at 1491).

There rest the post-judgment appellate findings of fact on "ample evidence" of "clear" and "unambiguous" consent now obtained in appellate proceedings "apparently" by the presence of attorneys before a Magistrate Judge that did not have

jurisdiction to hold any such "consent" finding "status conference" as also deemed proper by the Appellate forum, and all of which process was without the presence or knowledge or the party itself being in the courthouse. Such are the new appellate found jurisdictional facts. This Honorable Court however is in the same position to evaluate the same "consent" finding documents in that there is no testimony of witnesses to be evaluated. See: *UpJohn Company v. Schwartz*, 246 F.2d 254, 261 (2d. Cir. 1957) *Norwich Pharmacal Co. v. Sterling Drug, Inc.*, 271 F.2d 569 (2d Cir. 1959); *Bridell v. Algoble Trading Corp.* 194 F.2d 416 (2d Cir. 1951). Petitioner respectfully asserts there is no clear and unambiguous statutory and voluntary "consent" in the record of this case by all of the parties to have a federal Magistrate Judge enter Article III final judgments, even in that part of the case as embodied in the partial judgment (**Appendix "C"**) because of his severed trial footnote. The transcript of the November 20, 1991 conference was in the record before the Court of Appeals.

Moreover, the Petitioners fully believe that the Court of Appeals could not properly ignore and hold in abeyance for over 3 years the resolution of their challenge to federal subject matter jurisdiction, non-existing at the Magistrate Judge and appellate levels. The cases are indeed numerous by many courts of the United States, including the Circuit Court of Appeals for the 11th Circuit, that apply the rule of scrutinizing, as the first order of business, the existence or not of its own jurisdiction as well as that of the Court from where there arose the judgment under review. In that connection the Court in *Coury v. Prat*, 85 F.2d 244 (5th Cir. 1996) stated the issue as follows:

> "It is axiomatic that the federal courts have limited subject matter jurisdiction and cannot

> entertain cases unless authorized by the Constitution and legislation. Id. at 5. The parties can never consent to federal subject matter jurisdiction, and lack of such jurisdiction is a defense which cannot be waived. Fed. R. Civ. P. 12(h)(3); See City of *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76, 62 S. Ct. 15, 20, 86 L.Ed. 47 (1941). Accordingly, there is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court. [**6] See, e.g. *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984); 1 J. Moore, Moore's Federal Practice 0.71[5.-1] (1996). The lack of subject matter jurisdiction may be raised at any time during pendency of the case by any party or by the court. Fed. R.Civ.P.12(h)(3). Moreover, the Supreme Court has held that a party cannot waive the defense and cannot be estopped from raising it. E.g., *Insurance Corp of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed. 2d 492 (1982); *Owen Equip. & Erection* [**8] Co. v. Kroger, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed. 2d 274 (1978).

The rule that issues not preserved for review are not addressed by a Court of Appeals is subject to the exception that parties to a case can neither waiver objections nor consent to subject matter jurisdiction. See *United Liberty Life Insurance Company v. Ryan*, 985 F.2d 1320 (6th Cir. 1993). The rule also holds that there is a threshold duty in every case to determine whether the court has subject matter jurisdiction over the controversy before it, whether or not the parties have preserved

for appeal a challenge to the court's jurisdiction. *United Liberty, id.*; *Wolverine Radio Company v. Michigan Employment Security Commission*, 930 F.2d 1132 (6th Cir. 1991); *Cabalceta v. Standart Fuit Co.*, 883 F.2d 1553 (11th Cir. 1989); and subject-matter jurisdiction cannot be created or waived by agreement of parties *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984); *Sosna v. Iowa*, 419 U.S. 393, 95 S. Ct. 553 (1975); *City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 15 (1941); *St. Paul Mercury Indemnity Co. v. Red Cab Co.* 303 U.S. 283, 58 S. Ct. 586 (1938); *Mansfield, C.S.L.M.Ry.Co. v. Swan*, 111 U.S. 379, 4 S. Ct. 510 (1884). It is then well settled law that it is the first duty of a federal court to determine whether the case is properly within that court's subject matter jurisdiction. *Keller*, supra. The foregoing long line of cases completely contradict the Appellate Court's conclusion that it should be after more than 3 years of various appellate processes, held after the lack of existence of federal subject matter has been presented, that new and inconsistent facts are to be inferred with which to make a determination on the lack of the said subject matter jurisdiction. Petitioner respectfully claim that this case is remarkable when compared with over two centuries of federal jurisprudence where subject matter jurisdiction has never been attained thru application of "estoppel" and "waiver" theories on ex-post facto referral conduct. The existence of a federal judiciary vis a vis state judiciary and the separation of such systems, has been most rigidly followed by this Court and is the sole reason for the existence of Fed. Rul. of Civ. P.12(h)(3). It is indeed a most important federal question that is affected by the erroneous decision rendered below.

CONCLUSION

Petitioners respectfully request review of the judgement entered below by this Court with the issuance of a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Dated: January 27, 1998

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals,

Eleventh Circuit.

Nos. 93-4491, 93-5307, 94-4526 and 94-4686.

GENERAL TRADING INCORPORATED, Plaintiff-Counterclaim-Defendant-Appellant-Cross-Appellee.

v.

YALE MATERIALS HANDLING CORPORATION, Defendant-Counterclaim-Plaintiff-Appellee-Cross-Appellant,

Jose M. Baeza, Sr., Counterclaim Defendant-Appellant,

Jose M. Baeza, Jr., Et Al., Counterclaim Defendants.

General Trading Incorporated, Plaintiff-Counterclaim-Defendant-Appellant,

v.

Yale Materials Handling Corporation, Defendant-Counterclaim-Plaintiff-Appellee,

Jose M. Baeza, Sr., Counterclaim Defendant-Appellant,

Jose M. Baeza, Jr., Et Al., Counterclaim Defendants.

General Trading Incorporated, Plaintiff-Counterclaim-Defendant-Appellee Cross-Appellant,

v.

Yale Materials Handling Corporation, Defendant-Counterclaim-Plaintiff-Garnishor-Appellant-Appellant-Cross-Appellee,

Gonzalez Trading, Inc., a foreign corporation, Jose M. Jose Manuel Baeza, Sr., Jose M. Baeza, Jr., Javier Baeza, Counterclaim-Defendants-Appellees-Cross-Appellants,

Power Depot, Inc., a Florida Corporation, Michele M. Baeza, Involuntary Supplemental Defendant, Encarnacion Gonzalez, Involuntary Supplemental Defendant, Garnishees-Appellees-Cross-Appellants,

Ocean Bank, Ocean Bank of Miami, First Florida Savings Bank, FSB, Barnett Bank of Broward County, N.A., Joe's Rental, Inc., America Discount, Inc., G.T. Americas, Inc., Garnishees,

G. T. Corp., Garnishee-Appellee-Cross-Appellant,

Franchel Enterprises, Inc., Gary Gerrard, P.A., Garnishees,

GTE International Inc., Compania Dominicana de Telefonso, C. Por. A., Intervenor-Defendants.

General Trading Incorporated, Plaintiff-Appellant-Cross-Appellee,

v.

Yale Materials Handling Corporation, Defendant-Counterclaimant-Appellee-Cross-Appellant,

Gonzalez Trading, Inc., a foreign corporation, Counterdefendant-Appellee-Cross-Appellant,

Jose Manuel Baeza, Sr., Counter-defendant-Appellant-Cross-Appellee,

Jose M. Baeza, Jr., Counterdefendant-Appellee-Cross-Appellant,

Power Depot, Inc., a Florida Corporation, Michele M. Baeza, Involuntary Supplemental Defendant, Encarnacion Gonzalez, Involuntary Supplemental Defendant, Defendants,

Ocean Bank, Ocean Bank of Miami, First Florida Savings Bank, FSB, Barnett Bank of Broward County, N.A., Joe's Rental, Inc., America Discount, Inc., G.T. Americas, Inc., G.T. Corp., Franchel Enterprises, Inc., Gary Gerrard, P.A., Greenberg, Trauig, Hoffman, Lipoff, Rosen & Quentel, P.A., Garnishees,

GTE International Inc., Compania Dominicana de Telefonso, C. Por. A., Intervenors-Defendants,

James S. Feltman, Receiver.

Aug. 22, 1997.

Appeals from the United States District Court for the Southern District of Florida. (No. 88-61-CIV-TEB), Ted E. Bandstra, Magistrate Judge.

Before ANDERSON and EDMONDSON, Circuit Judges, and FAY, Senior Circuit Judge.

ANDERSON, Circuit Judge:

I. *INTRODUCTION*

This case involves numerous parties who assert claims and counterclaims which arise out of proceedings before the district court as well as before the bankruptcy court. Appellants/counter-appellees General Trading, Inc. (GTI) and Jose Baeza, Sr. (Baeza, Sr.), GTI's president and principal shareholder, originally brought suit against appellee/counter-appellant Yale Materials Handling Corporation (Yale) for terminating a franchise agreement in which GTI acted as a dealer in forklifts and parts manufactured and supplied by Yale. Yale counterclaimed, and added additional counter-defendants, Jose Baeza, Jr. (Baeza, Jr.) and Javier Baeza, both sons of Baeza, Sr., and Gonzalez Trading, Inc. (Gonzalez Trading), a Puerto Rican corporation of which Baeza, Sr. was president and principal shareholder.

Three months after the litigation commenced, Yale filed an involuntary bankruptcy petition against GTI, which was dismissed by the bankruptcy court. Ultimately, the district court suit was referred to a magistrate judge for completion of trial and final disposition. The magistrate judge, *inter alia*, found the following: Yale had not wrongfully terminated the franchise agreement, GTI had breached the franchise agreement; and, Yale had wrongfully filed the involuntary bankruptcy petition. Javier Baeza and Baeza, Jr. were not found liable to Yale.

Subsequent to the magistrate judge's final judgment, the magistrate judge granted Yale's motion to implead supplemental defendants (new transferees),[1] as well as Baeza, Jr., all of

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[1] The new transferees include the following parties: (1) Javier Baeza; (2) Power Depot, Inc. (Power Depot), a Florida corporation owned and operated by Javier Baeza; (3) Michele M. Baeza, the daughter of Baeza, Sr.; and, (4) Encarnacion Gonzalez, the ex-wife of Baeza, Sr. and mother of Javier Baeza, Baeza, Jr., and Michele M. Baeza.

whom allegedly received fraudulent transfers from GTI and Baeza, Sr. After impleading the parties and holding hearings, the magistrate judge set aside a number of fraudulent transfers made to the new transferees. The new transferees, in withdrawing their motion for a new trial, submitted a written acceptance of judgment to the magistrate judge. Subsequent to accepting the magistrate judge's judgment, the new transferees challenged the magistrate judge's authority under 11 U.S.C. § 636(c); at this time, the original counter-defendants also asserted challenges to the magistrate judge's authority.

In this opinion, we address claims on appeal raised by the original parties to the suit in the district court, as well as claims raised by the new transferees who were impleaded in the supplemental proceedings.

II. *FACTS*[2]

Yale is a manufacturer of forklifts and lift trucks. In November, 1978, Yale and GTI entered into a Dealer Marketing Agreement (DMA), whereby GTI was authorized to act as a dealer in forklifts and parts manufactured and supplied by Yale. GTI's franchise agreement was financed in two different ways: (1) GTI was able to purchase service parts and equipment from Yale on an open account; and, (2) Heller Financing Company (Heller) agreed to provide floor plan financing for general sales inventory.[3]

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[2] At times, this opinion directly quotes one or more of the courts below in reciting those facts which are undisputed.

[3] Heller provided financing to authorized retail Yale dealerships for the purchase of Yale products. In March 1986, GTI entered into a Financing and Security Agreement (Security Agreement) with Heller where Heller extended credit to finance GTI's acquisition of forklifts from Yale. In exchange, Heller had a security interest in GTI's inventory financed under the Security Agreement. Under the Security Agreement, if GTI failed to make payments, Heller had the

In December 1987, Yale canceled the franchise agreement with GTI for the following reasons: GTI was abusing Yale's special pricing practices[4] procured special pricing from Yale based upon false information involving sales to both real and nonexistent customers. ; GTI regularly and repeatedly submitted false warranty claims to Yale for repair work not actually performed, or for repairs not covered by a Yale warranty; and, GTI sold Yale forklifts on several occasions to customers representing the units to be new when in fact they had been used. In response, GTI immediately stopped payment on checks issued to Heller,[5] and refused to make any further payments to Yale on the open account. GTI refused to pay despite the fact that it continued to receive proceeds from prior and subsequent sales of its inventory of Yale forklifts and parts. As a result of GTI's default on the notes and Yale's termination of GTI as a dealer, Heller declared GTI in default under the Security Agreement, and exercised its right to force Yale to take an assignment of Heller's rights under the floor financing plan.

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right to assign to Yale all of its rights in the Security Agreement, after which all of GTI's duties and obligations under the Security Agreement would be owed to Yale.

[4] Under a "special pricing program," Yale lowered its standard wholesale price on a given forklift unit provided that certain requirements were met. Beginning in 1981, GTI routinely

[5] On January 5, 1988, a GTI check in the amount of $57,565.08, made payable to Heller dated December 8, 1987, was returned unpaid by GTI's bank because GTI had stopped payment on the check. This check was payment for and remittance of proceeds from the sale of 10 Yale forklifts from GTI's inventory during or around November 1987. At about the same time, GTI stopped payment on a second check made payable to Heller in the amount of $1,116.

A. *Underlying litigation in the district court*

Shortly after the termination of the franchise agreement, in December 1987, GTI and its president and principal shareholder, appellant/cross-appellee Jose Baeza, Sr. (Baeza, Sr.) filed suit in state court for, *inter alia*, breach of the DMA by wrongful termination.[6] Because diversity jurisdiction existed, Yale removed the case to federal court where it asserted a number of counterclaims, including breach of the DMA through submission of false pricing and warranty claims; fraudulent conveyance of corporate assets which constituted secured collateral; and, failure to pay notes and monies when due on the open account. Yale later amended its counterclaim to add counter-defendants Javier Baeza, Baeza, Jr. (also known as Manny Baeza),[7] and Gonzalez Trading, a Puerto Rican dealership owned and controlled by Baeza, Sr. which sells a competing brand of forklift. Following the filing of the lawsuit, the district court issued a prejudgment writ of replevin for Yale forklifts and parts still remaining on GTI's' premises.

In 1990, the parties' claims were tried in a non-jury trial for over 13 days before a judge in the United States District Court for the Southern District of Florida. The presiding judge resigned before the case was completed, and the case ultimately was transferred to District Judge William J. Zloch.

B. *Referral of underlying litigation to a magistrate judge*

On August 30, 1991, the parties' attorneys attended a status conference with the new district court judge, and discussed the

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[6] GTI also brought suit for breach of fiduciary duty, tortious interference with a business relationship, and failure to dispose of secured collateral in a commercially reasonable manner.

[7] Yale's claim against Manny Baeza was severed from the litigation.

possibility of having the case referred to a United States magistrate judge. On November 20, 1991, the attorneys for Yale, as well as the attorneys for GTI, Gonzalez Trading, Baeza, Sr., Javier Baeza, and Baeza, Jr. attended a status conference before United States Magistrate Judge Ted. E. Bandstra, and presented a signed consent to the completion of the trial before a United States magistrate judge, pursuant to 28 U.S.C. § 636(c). At the conference, the attorneys stipulated to proceed in the manner provided by Amended Rule 63 of the Federal Rules of Civil Procedure. The preamble of the consent and stipulation listed GTI, Baeza, Sr., Javier Baeza and Yale, and the signature of these parties' attorneys appeared at the end of the document. After receiving the consent and stipulation, the magistrate judge stated that "apparently there is an agreed consent to have this case now be completed, not restarted, but completed before me. Is that correct?" Yale's attorney responded in the affirmative; no party objected to the magistrate judge's statement regarding consent.

Gonzalez Trading was not specified in the preamble; however, that company's attorney, as well as its corporate agent, Baeza Sr., was present at the status conference. In addition, Baeza, Jr. was not listed in the preamble of the consent and stipulation. At the status conference, the magistrate judge asked Baeza, Jr.'s attorney whether Baeza, Jr. would consent to reference of the completion of the bench trial before him. His attorney answered, "I don't think we have any problem with that. I think that's fine."[8]

On November 27, 1991, the district court issued an order of referral, whereby the "trial and final disposition" of the litigation was referred to a United States magistrate judge

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[8] The magistrate judge requested that Baeza, Jr.'s attorney put his oral consent in writing subsequent to the conference; however, written consent was never forthcoming.

pursuant to 28 U.S.C. § 636(c) and pursuant to Rule 1(h) of the Magistrate Rules for the United States District Court, Southern District of Florida. In the order of referral, the district court stated that the consent and stipulation had been carefully reviewed, and was approved, ratified and adopted by the district court. Furthermore, the order of referral stated that any party objecting to the order "shall *file* said Objections with the Clerk of this Court, ... within seven (7) calendar days from the date of this Order. The failure of any party to file Objections to the contents or any provision of this Order shall be deemed a total waiver of the contents and provisions of this Order." (emphasis in original). No party filed objections to the referral within the specified time period.[9]

After the parties completed the trial, on September, 30, 1992, the magistrate judge ruled for Yale on GTI's wrongful termination claim based on his finding that GTI had repeatedly made false pricing requests and fraudulent warranty claims.[10] Yale was awarded $1,119,612 for GTI's breach of contract, and for various other commercial claims which it asserted. In addition, the magistrate judge found that Yale had filed the involuntary bankruptcy petition in bad faith, and awarded GTI punitive damages of $500,000 pursuant to 11 U.S.C. § 303(i)(1)(B), as well as attorney's fees and costs of $89,777, pursuant to § 11 U.S.C. § 303(i)(1)(A), and (B). Codefendants Javier Baeza, and Gonzalez Trading were not found to be liable. On April 28, 1993, the court entered an amended final judgment which, *inter alia*, entered judgment in favor of Yale

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[9] At a pretrial conference on January 16, 1992, which was attended by both Yale's and GTI's attorneys, the magistrate judge stated that "[t]he file will reflect that this bench trial ... [is] being consented in front of me, a magistrate judge, pursuant to 28 U.S.C. § 636(c)(1) and also Federal Rule of Civil Procedure 73(b)." No attorney objected to this statement.

[10] At oral argument, GTI and Baeza, Sr. conceded that they are not appealing the merits of the magistrate judge's decision.

and against GTI and Baeza, Sr. in the amount of $1,139,528; this amount included post-judgment interest. In addition, on November 10, 1993, final judgment in Yale's favor was entered for the additional amount of $2,279,181.36 against GTI and Baeza, Sr., for attorney's fees and costs incurred by Yale in the case.

C. *Supplementary Proceedings & Impleader of Fraudulent Transferees*

In conducting its discovery in aid of execution of the judgment, Yale uncovered a number of fraudulent transfers made by GTI and Baeza, Sr. subsequent to September 30, 1992, the date of the magistrate judge's memorandum opinion and order. On July 8, 1993, Yale filed an emergency motion with the magistrate judge, seeking to commence additional proceedings pursuant to Fed.R.Civ.P. 69, and Florida Statute 56.29, in aid of execution of the amended judgment. This motion requested that the magistrate judge ask the following parties to show cause why certain property which they received from GTI and/or Baeza, Sr. should not be subject to execution to satisfy Yale's judgment: (1) Javier Baeza; (2) Jose Baeza, Jr.; (3) Power Depot, a Florida corporation owned and operated by Javier Baeza; (4) Michele M. Baeza, the daughter of Baeza, Sr.; and, (5) Encarnacion Gonzalez, the ex-wife of Baeza, Sr. and mother of Javier Baeza, Baeza, Jr., and Michele M. Baeza. According to Yale, these parties had received assets from GTI and/or Baeza, Sr. in violation of Florida's Uniform Fraudulent Transfers Act (UFTA), Chapter 726, Florida Statutes, and/or in violation of Florida's bulk sales laws, Chapter 676, Florida Statutes. Yale's motion sought to set aside the transfers as fraudulent and sought the conveyance of the subject assets to Yale as partial payment of the final judgments entered by the magistrate judge's amended final judgment.

Yale's initial motion was denied by the magistrate judge, but

Yale renewed the motion on August 30, 1993. On September 17, 1993, the magistrate judge granted Yale's motion, and impleaded supplemental defendants Michele M. Baeza, Encarnacion Gonzalez, and Power Depot (all of whom are referred to throughout this opinion as "new transferees") and ordered them to show cause as to why the subject assets should not be declared fraudulently acquired. In addition, the magistrate judge ordered counter-defendants Baeza, Jr. and Javier Baeza to show cause as to why they should not be subject to Yale's judgments to the extent that each participated in or benefited from the challenged transfers of property and subject assets.[11] All of the new transferees responded to the order to show cause prior to evidentiary hearings on Yale's motion for supplementary proceedings. In addition, all the new transferees filed proposed findings of fact and conclusions of law.

After holding evidentiary hearings the magistrate judge issued an order on February 25, 1994, which set aside or invalidated the following transfers:[12] Baeza, Sr.'s transfer of six lots of real property in Miami to Michele Baeza; Baeza, Sr.'s transfer of his 43 foot Bertram yacht to Baeza, Jr.; Baeza, Sr.'s attempt to transfer four lots in West Palm Beach to Javier Baeza; GTI's transfer of $550,000 to GT corporation (formerly Gonzalez Trading); GTI's payment of a bonus of $250,000 to Javier Baeza; and, GTI's payment of a bonus of $26,789 to Baeza, Jr. The magistrate judge concluded that Power Depot was not liable to Yale. On April 12, 1994, separate judgments were entered effectuating the magistrate's order.[13] Yale's

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[11] Because Javier Baeza had been severed from the original suit, we include him in our "new transferee" classification. While Yale's emergency motion alleged that Baeza, Jr. also had received fraudulent transfers, he is not classified as a new transferee, as he was a party throughout the original proceedings.

[12] The order also granted Yale's motion for the appointment of a receiver.

objections to the magistrate judge's ruling regarding Power Depot are addressed in this appeal.[14]

After the magistrate judge entered final judgment, the new transferees filed motions for a new trial in connection with the supplemental proceedings. This motion was withdrawn, however, on April 8, 1994. In withdrawing their motion for a new trial, the new transferees submitted to the magistrate judge a written acceptance of judgment, in which they stated the following: "[t]o obtain peace of mind, and go about their business, without admission of any facts, they accept the Judgment entered in the case at bar, dated February 25, 1994.... "

D. *Challenges to the magistrate judge's authority*

On May 2, 1994, the new transferees filed a motion seeking an emergency hearing to vacate the final judgments of the magistrate, wherein they contended that they had not consented to the magistrate judge's authority as required under 11 U.S.C. § 636(c), and that the magistrate judge lacked the subject matter jurisdiction to enter judgments. GTI, Baeza, Sr., Baeza, Jr. and Gonzalez Trading also filed motions challenging the magistrate judge's authority. On May 10, 1994, the magistrate

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[13] Subsequent to the magistrate judge's final judgments, Yale and the Receiver filed a joint motion for contempt because the defendants and new transferees had evaded Yale's judgments. On March 10, 1995, the court conducted an evidentiary hearing on the joint motion, and neither GTI nor Baeza, Sr. made any response or offered any evidence in opposition to the motion for contempt. On March 23, 1995, the magistrate judge entered an order certifying facts for contempt and an order to show cause. Yale then filed an emergency motion with this court for a limited remand to permit the district court to proceed with a hearing on the contempt motion. On October 10, 1995, this court granted Yale's motion. On March 28, 1996, the district court issued an order imposing contempt sanctions.

[14] The new transferees do not appeal the merits of the magistrate judge's findings.

judge conducted a hearing on these parties' emergency motions; the motions were denied on May 23, 1994. The parties appealed the magistrate judge's May 23, 1994, order to this court; that appeal is addressed in this opinion.

At the same time that Baeza, Jr. and Gonzalez Trading filed their motion with the magistrate judge to determine whether he had jurisdiction, they also filed a motion with the district court to vacate the order of referral. On October 24, 1994, the district court issued an order denying Baeza, Jr. and Gonzalez's motion. In the order, the district court dismissed the motion for lack of jurisdiction because the issue of the magistrate judge's authority at that time was pending on appeal to this court. In the alternative, the district court found that Baeza, Jr. and Gonzalez Trading had consented to the magistrate judge's authority pursuant to 28 U.S.C. § 636(c). The district court's October 24, 1994, order was appealed to this court. On August 21, 1995, this court affirmed the district court's dismissal, stating that the district court "lacked jurisdiction to entertain appellants' motion to vacate the order of referral to the magistrate during the pendency before this Court of the parties' earlier appeals raising the issue of the magistrate's authority in this case."

E. *Bankruptcy Proceedings*

On April 8, 1988, three months subsequent to the original litigation in the district court, Yale filed a petition for involuntary bankruptcy against GTI in the United States Bankruptcy Court for the Southern District of Florida, pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 303(a).[15]

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[15] Yale was joined in the petition by two other creditors of GTI, Richard Bandler Co., Inc., and International Brokerage, Inc. A fourth creditor, GTE International, Inc. and Compania Dominicana de Telefonos, C. Por, affiliated through common ownership, intervened the following month.

Shortly thereafter, Yale moved for relief from the automatic stay in the bankruptcy court so that it could pursue prejudgment remedies, such as the writ of replevin, in the district court action. That motion was granted.

On June 30, 1988, the bankruptcy judge dismissed the involuntary bankruptcy petition following a two-day trial. The bankruptcy court disregarded Yale's claim for inventory payments of approximately $491,000, as well as Yale's claim that GTI had used Yale collateral to pay other creditors, because it concluded that they were subject to a bona fide dispute in the district court action. Once these claims were excluded, the bankruptcy court found that the creditors who brought the involuntary petition had failed to prove that GTI was generally not paying its debts as they became due. In addition, the bankruptcy court concluded, *inter alia*, that the creditors could obtain adequate relief in the district court action, and that no special circumstances existed to warrant exclusive relief under the Bankruptcy Code. The bankruptcy court's dismissal was affirmed by the district court on May 26, 1989. Yale now appeals the district court's affirmance of the bankruptcy court's dismissal of the involuntary petition.

The question of whether Yale wrongfully filed the petition was not addressed by the bankruptcy court, and was reserved for a later determination. That issue was litigated before the magistrate judge along with the issues presented in the underlying litigation. In an opinion issued on September 30, 1992, the court found that Yale filed the involuntary bankruptcy petition in bad faith, and, pursuant to 11 U.S.C. § 303(i)(1)(A), and (B), awarded GTI punitive damages of $500,000 as well as attorney's fees and costs of $87,777. Yale's appeal of this ruling is also addressed in this opinion.

III. *ISSUES*[16]

In addition, we note that Yale, in its briefs, has failed to adequately support its assertion that the magistrate judge should have addressed Counts 8, 9, 14, 15 and 16. Those assertions are deemed abandoned.

This court addresses the following issues raised on appeal: (1) whether counter-defendants GTI, Baeza, Sr., Gonzalez Trading, Baeza, Jr., as well as the new transferees, consented pursuant to 28 U.S.C. § 636(c) to proceed before the magistrate judge; (2) whether in the supplementary proceedings the magistrate judge erred in finding that new transferee Power Depot was not the recipient of a fraudulent transfer; (3) whether the magistrate judge erred in finding that Yale brought the involuntary bankruptcy petition in bad faith; and, (4) whether it was error for the district court to affirm the bankruptcy court's dismissal of the involuntary bankruptcy petition.

IV. *STANDARD OF REVIEW*

With respect to the proceedings in the district court, this court reviews factual findings for clear error, and reviews application of law to those facts *de novo*. *Lykes Bros., Inc. v. U.S. Army Corps of Engineers*, 64 F.3d 630, 634 (11th Cir.1995). For a factual finding to be clearly erroneous, this

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[16] While GTI and Baeza, Sr. initially raised a number of claims on appeal asserting error with the merits of the magistrate judge's October 2, 1992, order, those claims were abandoned later, and at oral argument GTI and Baeza, Sr. conceded that they no longer make these arguments. In addition, while GTI and Baeza, Sr. had appealed the magistrate judge's November 10, 1993, final judgment on attorneys' fees and costs, they no longer assert this claim. Accordingly, the aforementioned arguments are deemed abandoned. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989) (citing cases for this proposition).

court, after reviewing all of the evidence, must be "left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948)).

With respect to the bankruptcy proceedings, this court conducts a *de novo* review of determinations of law, whether from the bankruptcy court or the district court. *In re Bilzerian*, 100 F.3d 886, 889 (11th Cir.1996). We review the bankruptcy court's factual findings, however, under the clearly erroneous standard. *Id.*

V. *DISCUSSION*

A. *Whether 28 U.S.C. § 636(c) was satisfied.*

In order for a magistrate judge to oversee any or all proceedings in a nonjury civil matter, and to order the entry of judgment in the case, 28 U.S.C. § 636(c) requires the "consent of the parties."[17]

Notwithstanding any provision of law to the contrary–... Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.

In addition to consent, § 636(c) also requires that the magistrate judge be specifically designated by the district court. In this case, the district court's November 27, 1991 order of referral clearly satisfies this requirement. This court has held

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[17] Section 636(c)(1) of Title 28 of the United States Code, the provision which is at issue in this case, states the following:

that "[c]onsent must be "clear and unambiguous,' and cannot be inferred from the conduct of the parties." *Hall v. Sharpe*, 812 F.2d 644, 647 (11th Cir.1987) (citing *Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir.1986), and cases collected therein).

On appeal, GTI, Baeza, Sr., Baeza, Jr., Gonzalez Trading, as well as the new transferees–Javier Baeza, Michele Baeza, Encarnacion Gonzalez, and Power Depot–all contend that they did not consent to the magistrate judge as required by § 636(c), and therefore he lacked the authority and jurisdiction to enter final judgment or oversee the supplemental proceedings.[18]

According to appellants, this court's August 21, 1995 opinion resolved the issue of whether the magistrate judge had jurisdiction, and res judicata precludes the retrying of this issue. Appellants entirely misinterpret this court's August 21, 1995, mandate, and we reject this argument as frivolous. Because the context of consent for the original parties to the litigation is different from the new transferees, we address their claims separately.

1. *Whether GTI, Baeza, Sr., Baeza, Jr. and Gonzalez Trading consented to appear before the magistrate judge.*[19]

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[18] In arguing that the magistrate judge erred in denying their motions to vacate the final judgment for lack of jurisdiction, these parties also argue that the magistrate judge failed to follow the mandate issued by this court on August 21, 1995. In this court's August 21, 1995, unpublished opinion, we affirmed the district court's dismissal of Baeza, Jr. and Gonzalez' motion to vacate the order of referral because the district court lacked jurisdiction. Citing *United States v. Hitchmon*, 602 F.2d 689, 692-94 (5th Cir.1979) (en banc), we found that the district court lacked jurisdiction to vacate the order of referral because the issue of the magistrate judge's authority at that time was pending on appeal before this court.

[19] There is substantial question of whether these parties' briefs on appeal even raise the issue of consent. Because this issue is so readily resolved, however,

After carefully reviewing the record, we readily conclude that there is ample evidence that GTI, Baeza, Sr., Gonzalez Trading, and Baeza, Jr. explicitly and unambiguously consented to appear before the magistrate judge. First, the attorneys for all four of these parties attended a status conference on November 20, 1991, where they presented to the magistrate judge a signed consent and stipulation to proceed before the magistrate judge to complete the trial.

While the preamble to the consent and stipulation only named Yale, GTI, and Baeza, Sr.,[20] and did not list Baeza, Jr. or Gonzalez Trading, their consent was clearly conveyed at the November 20, 1991, status conference. When Baeza, Jr.'s attorney was asked by the magistrate judge whether his client would consent to the completion of the trial before a magistrate judge, he answered, "I don't think that we have any problem with that. I think that's fine." Because "[t]here is no requirement [in § 636(c)] ... that the consent to referral to a magistrate be in writing, [but] only that it be express and on the record," Baeza, Jr. clearly consented. *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir.1987); *King v. Ionization Intern., Inc.*, 825 F.2d 1180, 1185 (7th Cir.1987). With respect to Gonzalez Trading, even though it was omitted from the preamble of the written document, its attorney signed the consent. More important, the initial focus of the status conference was to ensure that there was proper consent to try the case before the magistrate judge. All parties were present; as to Gonzalez Trading, not only was its counsel present, but also present was

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we will assume arguendo that it was raised on appeal. These parties' argument asserting a need for consent by Richard Bandler & Co. is rejected as without merit and warranting no discussion.

[20] The preamble also listed Javier Baeza. Because he was severed from the underlying litigation, and was later impleaded as an involuntary supplemental defendant, we address the issue of whether he consented in our discussion of the new transferees' consent.

Baeza, Sr., its president, principal shareholder and corporate agent. With all parties thus present and the consent issue expressly on the table, the magistrate judge stated on the record that: "apparently there is an agreed consent to have this case now to be completed ... before me. Is that correct?" Yale's attorney answered in the affirmative, clearly expressing the view of all present. We conclude that there was explicit and unambiguous consent by all present.

Moreover, we note that GTI, Baeza, Sr., Baeza, Jr., and Gonzalez Trading, all were directed by the district court in its order of referral to file any objections to the order of referral within seven days. A failure to object to the authority of a magistrate judge, especially when preceded by express consent to the magistrate judge (as we have found above), waives any constitutional right to an Article III judge. *See Peretz v. United States,* 501 U.S. 923, 935 n. 12, 111 S.Ct. 2661, 2669 n. 12, 115 L.Ed.2d 808 (1991) (where a party who had consented to a magistrate judge's authority to conduct voir dire of a jury in a felony case, and who did not object to the magistrate judge's authority, waived his constitutional right to an Article III judge; the Court further held that "defendants may waive the right to judicial performance of other important functions, including the conduct of the trial itself in ... civil proceedings").

Subsequent to consenting to the magistrate judge's authority, these parties participated in all the pre-trial and post-trial proceedings without objecting the magistrate judge's authority or jurisdiction; only when an adverse judgment was issued by the magistrate judge did the parties contest his authority. We find appellants' arguments that they never consented incredulous, and any argument that they were deprived of their constitutional right to an Article III judge was waived.[21]

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[21] Because the parties clearly consented to the authority of the magistrate judge, we do not decide today the issue of whether a failure to object to the magistrate

2. *Whether the new transferees consented to the supplemental proceedings before a magistrate judge.*[22]

Under Fed.R.Civ.P. 69, state law concerning supplementary proceedings to enforce a judgment will govern to the extent that it is not preempted by federal law. *See Allied Indus. Int'l, Inc. v. AGFA-GEVAERT, Inc.*, 688 F.Supp. 1516, 1517 (S.D.Fla.1988), *aff'd*, 900 F.2d 264 (11th Cir.1990) (Table). Florida Statute 56.29 sets forth the procedures for impleading supplemental defendants. "Under decisional law interpreting section 56.29, the two jurisdictional prerequisites for supplementary proceedings are (1) an unsatisfied writ of execution, and (2) an affidavit averring that the writ is valid and unsatisfied along with a list of persons to be impleaded." *Id.* at 1518 (citing *Wieczoreck v. H & H Builders, Inc.*, 450 So.2d 867, 871 (Fla.Dist.Ct.App.1984)). The new transferees have not argued that either of these jurisdictional prerequisites was not met. In fact, the new transferees cite *Allied Indus. Int'l*, and acknowledge that federal courts may implead for supplemental proceedings in aid of execution by order to show cause. They argue, however, that the proceedings were nevertheless defective because they were impleaded by a magistrate judge and not by a district court judge. In light of our finding *infra* that the new transferees expressly consented to proceed before the magistrate judge, and in light of the fact that they never objected to this, this argument is waived. *Cf.*

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judge results in waiver of the consent requirement of § 636(c).

[22] Following the September 30, 1992 judgment, the new transferees were impleaded by the magistrate judge's order to show cause as to why the assets at issue should not be declared fraudulently acquired. On appeal, the new transferees argue that they should have been served with a summons and complaint, and that, because Yale's failed to do so, the court never obtained personal jurisdiction over them. We disagree.

Peretz v. U.S., 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991).

Moreover, we note that "[a] party that fails to raise a defense of lack of personal jurisdiction at the appropriate time is deemed to have conferred personal jurisdiction on the court by consent." *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir.1990); *see* Fed.R.Civ.P. 12(h) (defense of lack of personal jurisdiction is a waivable defense).

For the foregoing reasons, we reject the new transferees' argument that the manner in which they were impleaded was defective, and that the district court never obtained personal jurisdiction over them. The other arguments which the new transferees raise on appeal are without merit and warrant no discussion. Assuming arguendo that this court would require the consent of latecomers,[23] we find that the new transferees–Michele Baeza, Javier Baeza, Encarnacion Baeza, and Power Depot–also consented to the authority of the magistrate judge. A review of the record reveals that the transferees gave their consent to the magistrate judge's authority subsequent to the final judgment in the supplementary proceedings in the form of an acceptance of judgment. On April 8, 1994, the new transferees submitted a motion to withdraw their request for a new trial, and accepted the magistrate judge's judgment. Clearly encompassed in this acceptance of judgment is an acknowledgment of the new transferees' consent to the authority and jurisdiction of the magistrate judge. Because § 636(c) "does not require a specific form or time of consent or even that it be in writing," the new transferees' acceptance of judgment constituted consent. *King*, 825 F.2d at 1185; *Smith v. Shawnee Library System*, 60 F.3d 317, 321 (7th Cir.1995)

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[23] *See, e.g., Caprera v. Jacobs*, 790 F.2d 442 (5th Cir.1986) (consent of latecomers required for the magistrate judge to have jurisdiction); *New York Chinese TV Programs v. U.E. Enterprises*, 996 F.2d 21 (2d Cir.1993).

("A late-submitted consent is an unequivocal representation that the magistrate was acting with the parties' consent") (quotations omitted).

Finally, as was the case with GTI, Baeza, Sr., Baeza, Jr. and Gonzalez Trading, the new transferees' consent, when coupled with a failure to object to the magistrate judge's authority, waived any argument that they were deprived of their constitutional rights. *See Peretz v. United States*, 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991).

B. *Whether Power Depot's purchase of approximately $1,185,000 in inventory and fixed assets from GTI constituted a fraudulent transfer.*

In conducting discovery in aid of execution of the judgment against GTI and Baeza, Sr., Yale uncovered a number of fraudulent transfers made by GTI and Baeza, Sr., between September 30, 1992, the date of the magistrate judge's opinion and order, and May 7, 1993, the day the amended final judgment against GTI and Baeza, Sr. was entered. After holding evidentiary hearings, the magistrate judge issued an order on February 24, 1994, which set aside or invalidated the following transfers:[24] (1) Baeza, Sr.'s transfer of six lots in Miami, Florida to his daughter Michele approximately ten weeks after the adverse September 1992 ruling; (2) Baeza, Sr.'s transfer in January 1993 of a 43' Bertram yacht to his son, Manny; (3) Baeza, Sr.'s January 1993 transfer of lots in West Palm Beach, Florida to his son Javier; (4) GTI's transfer between November 1992 and April 1993 of $550,000 to the GT

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[24] The magistrate judge found the above transfers to be fraudulent under one or more of the following Florida statutes: Fla. Stat. § 56.29(a), Fla. Stat. § 726.105(1)(a), and Fla. Stat. § 726.106. For a detailed discussion of these provisions, see the text of opinion, *infra*.

corporation,[25] a family owned business of which Baeza, Sr. was an insider;[26] (5) GTI's payment of a "bonus" on December 17, 1992, to Javier Baeza of $250,000; and, (6) GTI's payment of a "bonus" of $26,789 to Manny Baeza on January 12, 1993. While the magistrate judge found that the aforementioned transfers constituted fraudulent conveyances, it did not find GTI's transfer of $1,185,000 in inventory and fixed assets to Power Depot to be a fraudulent transfer.

Power Depot was started on October 27, 1992,[27] by Javier Baeza, who had previously worked at GTI and was a director of GTI. Javier Baeza was Power Depot's only officer and its sole shareholder. Power Depot hired GTI employees, remained at GTI's old location, used many of GTI's suppliers, and maintained many of GTI's former customers. On appeal, Yale raises the following arguments: the assets and inventory which Power Depot bought from GTI were fraudulently transferred; Power Depot is the alter ego of GTI, and therefore liable for GTI's debts; and, the transfer at issue is void because it violated Florida's bulk sales laws.[28]

In deciding whether Power Depot was the recipient of fraudulent transfers, the magistrate judge applied Fla. Stat. § 56.29(6)(a), which governs supplementary proceedings. Section 56.29(6)(a) provides that a judgment creditor, in this case Yale, may reach any property to which the judgment debtor, GTI,

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[25] This corporation was formerly Gonzalez Trading.

[26] Under Florida law, an individual is an insider to a debtor corporation if he or she is a director, officer, or person in control of the corporation. Fla. Stat. § 726.102(7)(b). Baeza, Sr. was an insider to GT corporation because he was the president and principal shareholder of the corporation.

[27] This was less than one month subsequent to the magistrate judge's September 30, 1992 opinion, where it held GTI and Baeza, Sr. liable for $1,139,528.

[28] Because of our disposition of the fraudulent transfer issue, we need not address Yale's alternative arguments that Power Depot was GTI's alter ego, and that Florida's bulk sales laws were violated.

transferred title within one year of service of process on him if the transferee is a relative, or is a person on confidential terms with the defendant.[29]

When, within one 1 year before the service of process on him, defendant has title to, or paid the purchase price of, any personal property to which his wife, any relative, or any person on confidential terms with defendant claims title and rights of possession at the time of examination, the defendant has a burden of proof to establish that such transfer or gift from him was not made to delay, hinder or defraud creditors. *See Allied Industries International, Inc. v. AGFA-GEVAERT, Inc.*, 688 F.Supp. 1516, 1520 (S.D.Fla.1988). Under § 56.29, GTI had the burden of proving that the transfer at issue was not made to delay, hinder or defraud Yale. In addition, to prove fraud "only a preponderance or greater weight of the evidence is required." *Wieczoreck v. H & H Builders, Inc.*, 475 So.2d 227, 228 (Fla.1985) (quoting *Rigot v. Bucci*, 245 So.2d 51, 53 (Fla.1971)).

Also applicable to GTI's transfer to Power Depot is Florida's Uniform Fraudulent Transfer Act (UFTA), which provides in relevant part:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent

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[29] Specifically, § 56.29 states the following:

> value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Fla. Stat. § 726.105(1). In determining "actual intent" under § 726.105(1)(a), the UFTA directs courts to consider whether any of the following "badges of fraud" are applicable to the transfer at issue:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.

> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

While "[a] single badge of fraud may only create a suspicious circumstance and may not constitute the requisite fraud to set aside a conveyance, ... several of them when considered together may afford a basis to infer fraud." *Johnson v. Dowell*, 592 So.2d 1194, 1197 (Fla.Dist.Ct.App.1992) (citing *Banner Constr. Corp. v. Arnold*, 128 So.2d 893, 896 (Fla.Dist.Ct.App.1961)). Moreover, while the UFTA lists a number of badges of fraud, "[i]t is clear from the language of the Statute that in determining intent, consideration may be given to factors other than those listed." *In re Miller*, 188 B.R. 302, 306 (Bankr.M.D.Fla.1995) (citing *Harper v. United States*, 769 F.Supp. 362 (M.D.Fla.1991)). In addition, courts take into account "the particular facts surrounding the conveyance," and avoid determining in a vacuum the presence or absence of a debtor's actual intent to hinder or delay a creditor. *Kirk v. Edinger*, 380 So.2d 1336, 1337 (Fla.Dist.Ct.App.1980).

Finally, Fla. Stat. § 726.106 is potentially applicable to this case. That statute applies to transfers affecting present creditors, such as Yale, and does not require proof of

fraudulent intent if: (1) the debtor was insolvent or became insolvent as a result of the transfer, and did not receive a reasonably equivalent value for the transfers; or, (2) the debtor made the transfer to an insider, and the insider had reasonable cause to believe that the debtor was insolvent. *Id.*

Applying Fla. Stats. § 56.29(6)(a), § 726.105 and § 726.106, the magistrate judge concluded that Power Depot had not been the recipient of a fraudulent transfer. We have serious doubts as to whether this finding by the magistrate judge was correct, and therefore vacate his finding on this issue.

The magistrate judge found the following factors to constitute badges of fraud: "[1] GTI had been sued at the time of the transfer; [2] the transfer was for value reasonably equivalent to the value of the assets; and [3] GTI became insolvent shortly after these transfers." In addressing the badges of fraud which were not present, the magistrate judge, stated, *inter alia*, that "Power Depot was not an "insider' to the transaction merely because Javier Baeza was its sole owner[,]" and that "the transfer did not represent all of the debtor's assets."

We are concerned with the magistrate judge's conclusion that the purchases by Power Depot of approximately $1,185,-000 in inventory and fixed assets from GTI in conjunction with GTI's termination of business activities was for fair value. In addressing whether fair consideration was given, no mention was made of the good will which obviously was transferred. Also confusing was the fact that, while the court made the statement that GTI's property was sold for "equivalent value" and "at a profit," it nevertheless listed this factor as a badge of fraud.

We also question the magistrate judge's general conclusion that Power Depot was not an insider. While we recognize that technically under the Florida law Power Depot

cannot be classified as an insider,[30] it is clear that in substance it was: Javier Baeza, who controlled Power Depot, was an insider to GTI (he was a director), and was the son of the person in control of GTI. A close relationship between a transferor debtor and a transferee is a factor equivalent to a badge of fraud which should be considered in determining fraudulent intent. *Banner Constr. Corp.*, 128 So.2d. at 897; *The Florida Bar v. Rood*, 620 So.2d 1252, 1254 (Fla.1993); *Harper*, 769 F.Supp. at 367 (where the court held that "[l]ack of consideration for the transfer, a close family relationship between transferor and transferee, pending or threatened litigation, and insolvency or substantial indebtedness can indicate fraudulent intent"); *Orlando Light Bulb v. Laser Lighting and Elec. Supply, Inc.*, 523 So.2d 740, 744 (Fla.Dist.Ct.App.1988) (close business relationship is a badge of fraud). The magistrate judge's opinion lacks language to indicate that he considered the fact that there was a close relationship between GTI and Power Depot.

In *Banner Constr. Corp.*, the court concluded that "[t]he recognized indicia or badges of fraud include the fact that the parties to the disputed transfer are related, one to the other, by blood or marriage, or are associated in business." 128 So.2d. at 896. In that case, a third party claimant in a garnishment proceeding, Banner Construction Corporation (Banner), appealed a jury verdict in favor of the plaintiff-creditor A.F. Arnold (Arnold). Banner had received an assignment from Bruce Bowen, Inc., of sums due from a court judgment in Bruce Bowen Inc.'s favor. At trial, Arnold, the garnishing creditor, alleged that Banner's claim was made in order to

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[30] To be an insider to debtor GTI, a person or an entity must be one of the following: (1) a director of GTI; (2) an officer of GTI; (3) a person in control of GTI; (4) a relative of a general partner, director, officer or person in control of GTI; (5) a partnership in which GTI is a general partner; or, (6) a general partner in a partnership of which GTI is a general partner. § 726.102(7)(b).

divert funds from Arnold and to avoid payment. The reviewing court looked at what badges of fraud were sufficient to uphold the jury verdict. *Id.* at 895.

On appeal, the court considered the close relationship of the parties to the disputed transfer, Bruce Bowen, Inc. and Banner. Bruce Bowen, Inc., had been incorporated in 1953 and was made up of officers related by blood or marriage, and was owned by its president, Bruce Bowen. In the fall of 1954, the company suffered from financial difficulties. *Id.* In the summer of 1955, Banner was formed. Banner was capitalized by Bruce Bowen and his relatives, and Banner's original officers and stockholders were all related by blood or marriage. In upholding the jury's verdict, the court considered the following factors to be badges of fraud:[31]

> The relationship of the interlocking directors and stockholders of Bruce Bowen, Inc., and Banner Construction Corporation, the precarious financial condition of the assignor, Bruce Bowen, Inc., and the capacity of Bruce Bowen as general manager and vice president of Banner and as president and sole owner of the stock of Bruce Bowen, Inc., ... constitute sufficient evidence to sustain the verdict of the jury.

Id. at 896. We think the facts of the present case closely resemble those in *Banner Construction.* Like that case, GTI's officers and directors are related, and Power Depot's president and sole shareholder, Javier Baeza, is an insider to GTI. In addition, like Banner, Power Depot was formed only a short time after GTI was suffering from financial difficulties; in this case GTI's financial problems stemmed from the multiple

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[31] We recognize that *Banner Constr. Corp.* was decided before the UFTA was passed. However, in passing the UFTA, the Florida legislature incorporated the legal and equitable principles of prior fraudulent conveyance law. *See Advest, Inc. v. Rader,* 743 F.Supp. 851, 852-53 (S.D.Fla.1990). Thus, we think it is appropriate to look at the legal analysis in *Banner Constr. Corp.* in applying and interpreting the UFTA.

judgments entered against it in the district court.

In addition to the magistrate judge's failure to consider the "close relationship" badge of fraud, we find error with the court's application of Fla. Stat. § 726.105(2)(e), which directs a court to consider whether a transfer "was of substantially all of the debtor's assets." Here, the transfer of GTI's assets and inventory was in conjunction with GTI's termination of business activities. Based on the record before us, there is a strong probability that "substantially all" of GTI's assets and inventory were transferred: GTI was selling its assets and inventory at the time it was closing its doors for business, and Power Depot took over other significant parts of GTI's business, as Power Depot hired GTI employees, remained at GTI's old location, used many of GTI's suppliers, and maintained many of GTI's former customers. In his order, the magistrate judge concluded that "the transfer did not represent all of the debtor's assets." The conclusory language used by the magistrate judge, without further explanation, makes us question whether the magistrate judge raised the standard for finding a badge of fraud under Fla. Stat. § 726.105(2)(e), i.e., did he inquire into whether "substantially all," rather than "all" of GTI's assets had been transferred.

Finally, the particular circumstances surrounding this case give us cause for concern. Around the time that GTI was selling its assets and inventory to Power Depot, GTI and/or Baeza, Sr. made a total of six fraudulent transfers. Moreover, the magistrate judge found that subsequent to the September 1992 opinion against Baeza, Sr. and GTI, "Baeza, [Sr.] has gone to extreme lengths to exhaust his own personal wealth through acquisitions of expensive art work, multiple ocean cruises, sizeable entertainment expenses, gambling at high stakes, large charitable deductions and other spending activities allegedly resulting ... in his inability to satisfy Yale's judgments against him." The actions taken by GTI and Baeza, Sr. shortly after the adverse district court judgment indicate a clear pattern

of fraud, and raise a substantial inference of an intent to hinder, delay, and defraud Yale. While we recognize that the magistrate judge was aware of the circumstances surrounding this conveyance, the magistrate judge's opinion leaves us with the impression that GTI's and Baeza, Sr.'s other actions were not taken into account in assessing whether GTI had fraudulently transferred its assets and inventory to Power Depot.

While we have serious concerns over whether the record supports the district court's conclusion that Power Depot's purchase of GTI's assets and inventory was not a fraudulent transfer, we decline at this point to reverse and render a decision for two reasons. First, this issue might be moot. Yale's judgment may have already been satisfied by the assets which the magistrate judge set aside in the transfers which he found to be fraudulent. Furthermore, if the transfer to Power Depot really was for fair value, that value would be in GTI, where Yale could reach it; there would be no need for a finding of fraudulent transfer. We have serious doubt, however, as to whether Power Depot paid the full value to GTI.[32]

In addition, before deciding this issue definitively ourselves, we would want more specific findings with respect to whether Power Depot really paid full value for the inventory and assets, as well as the good will. Furthermore, we would need the district court to reconsider whether "substantially all" of GTI's assets were sold to Power Depot. For the above reasons, we vacate the district court's decision, and remand for further proceedings not inconsistent with this opinion.

C. *Whether the magistrate judge erred in finding that Yale had filed the involuntary bankruptcy petition in bad faith.*

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[32] Indeed, if the transfer was not made for fair value, and if GTI was insolvent or became insolvent as a result of the transfer, no proof of fraudulent intent would be necessary to find a fraudulent transfer. Fla. Stat. § 726.106(1).

Approximately three months after GTI filed suit against Yale, on April 8, 1988, Yale filed a Chapter 7 involuntary bankruptcy petition against GTI, pursuant to 11 U.S.C. § 303(a). On appeal, Yale challenges the magistrate judge's finding that it filed the involuntary petition in bad faith, and therefore was liable to GTI for $500,000 in punitive damages under 11 U.S.C. § 303(i)(2).[33]

If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment ...

against any petitioner that filed the petition in bad faith for–

(A) any damages proximately caused by such filing; or

(B) punitive damages. On appeal, Yale argues that the magistrate judge used the wrong standard in determining whether it acted in bad faith.

Because "bad faith" is not defined in the bankruptcy code, and because there is no legislative history addressing the intended meaning of this language, courts have used different approaches to determine whether a petition was filed in bad faith. Some courts have established an "improper purpose test," under which bad faith exists where the filing of the petition was motivated by ill will, malice or the purpose of embarrassing or harassing the debtor. *In re Camelot*, 25 B.R.

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[33] If an involuntary petition is dismissed without the consent of all the petitioners and the debtor, and if a debtor does not waive the right to judgment, a court may grant judgment against any petitioner if it finds the petition was filed in bad faith; either damages proximately caused by the filing, or punitive damages can be awarded for the wrongful filing of a petition. 11 U.S.C. § 303(i)(2). Specifically, § 303(i)(2) states the following:

861, 864 (Bankr.E.D.Tenn.1982) (bad faith where motivation for filing involuntary petition was to "spitefully forestall the dissolution of the debtor corporation" and to frustrate the results of a state court proceeding); *see In re Better Care, Ltd.*, 97 B.R. 405, 410 (Bankr.N.D.Ill.1989).

A second line of authority applies what is known as an "improper use" test, where bad faith exists "when a creditor's actions amount to an improper use of the Bankruptcy Code as a substitute for customary collection procedures." *In re Better Care, Ltd.*, 97 B.R. at 410. An improper use includes instances where "a creditor uses an involuntary bankruptcy to obtain a disproportionate advantage to that particular creditor's position, rather than to protect against other creditors obtaining such a disproportionate advantage." *Id.* at 411.

The third line of authority analyzes the bad faith issue by reference to Bankruptcy Rule 9011, which is patterned after Fed.R.Civ.P. 11.[34]

The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. An analysis under Rule 9011 inquires into "a significant objective requirement bearing on the legal justification of a claim or defense: a reasonable inquiry into the facts and the law." *In re Turner*, 80 B.R. 618, 623 (Bankr.D.Mass.1987). In addition to requiring an objective inquiry, Rule 9011 requires a subjective inquiry as well: the

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[34] Rule 9011 provides the following:

bankruptcy proceeding cannot have been interposed for an improper purpose, "such as to harass, to cause delay, or to increase the cost of litigation." Rule 9011.

In finding that Yale had wrongfully filed the involuntary petition, the magistrate judge applied the subjective improper purpose test, and found that Yale filed the petition in bad faith. In concluding that Yale acted with "ill will, spite or malice," the magistrate judge noted, *inter alia*, that it had found GTI to be solvent, that Yale had received a personal guaranty from Baeza, Sr., and that Yale had the ability to recover damages in the district court case. On appeal, Yale argues that instead of using a subjective standard to determine bad faith, the magistrate judge should have made both an objective and subjective inquiry according to the standards set forth in Bankruptcy Rule 9011.

We need not decide what is the correct approach to determine bad faith, however, because we find that under any of the three enunciated tests, the magistrate judge's finding was clearly erroneous. While some of the facts point in the other direction, a careful review of the record leaves us firm in our conviction that Yale was primarily motivated, both objectively and subjectively, by proper purposes in bringing the involuntary petition.[35]

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[35] We recognize that the magistrate judge's finding relied on some facts which indicate that Yale may have acted with ill will in filing the petition. Nevertheless, we find that Yale had a plausible explanation for most of the facts relied on by the magistrate judge in finding bad faith. For example, the magistrate judge found suspect Yale's refusal of GTI's offer to allow Yale to repurchase its inventory. Under the DMA, however, Yale was under no obligation to repurchase any of its products because GTI had defaulted. Moreover, Yale did not know the value of this collateral, or its condition at the time. The magistrate judge also questioned Yale's abrupt termination of the DMA. Yet even the magistrate judge concluded that none of Yale's actions had constituted a breach of the DMA.

After carefully reviewing the record, we find that Yale's primary concern in filing the petition was to protect itself against other creditors' obtaining a disproportionate share of GTI's assets. This is a proper purpose for filing an involuntary petition. *See In re Better Care*, 97 B.R. at 411. There is ample evidence that GTI was preferring other creditors at Yale's expense. The evidence clearly shows that Yale had reason to believe that both GTI and its principal shareholder, Baeza, Sr., were liquidating all of Yale's secured collateral, and possibly liquidating GTI's other assets as well. In January 1988, an inspection of GTI's collateral revealed that GTI had sold at least 55 Yale forklifts since an October 1987 collateral audit of GTI. Most of the forklifts were sold to Gonzalez Trading, a Puerto Rican corporation owned by Baeza, Sr. GTI had not made remittance to Yale for any of these sales as required by the Financing and Security Agreement. In addition, at that inspection Baeza, Sr. informed Yale's credit manager, Leonard G. Thornborough, that GTI had deposited the proceeds from these sales into its own operating account at Ocean Bank of Miami, and used the sale proceeds to pay other creditors. In addition, Baeza, Sr. told Thornborough that he intended to continue selling Yale forklifts without remitting the proceeds to Yale, and, if necessary, he would take GTI into voluntary bankruptcy, retire from the business, and pursue GTI's lawsuit against Yale.[36] We think the above statements by Baeza, Sr. gave Yale reason to believe that their debts would not have been protected by the outcome of the lawsuit in the district court; had Baeza, Sr. carried out his threat to liquidate GTI entirely to deprive Yale of its money, Yale may not have

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[36] Thornborough's affidavit containing Baeza, Sr.'s statements did not contain hearsay. This evidence was admissible because it was not offered to prove the truth of the matter asserted, but instead to indicate Yale's reasons for wanting to protect its rights in bankruptcy. Moreover, we find these statements constitute an admission. *See* Fed.R.Evid. 801(c), (d)(2).

been protected even if it prevailed in the district court.

Moreover, Yale had documentary evidence which gave it reason to believe that Baeza, Sr. intended to carry out his threat to deplete GTI of its assets, and give a disproportionate share of those assets to creditors other than Yale.[37]judgment entered against him by the magistrate judge. The opinion setting aside the transfers noted that, "[s]ince [September 1992 when the court found Baeza, Sr. personally liable to Yale], Baeza [Sr.] has gone to extreme lengths to exhaust his own personal wealth through acquisitions of expensive art work, multiple ocean cruises, sizeable entertainment expenses, gambling at high stakes, large charitable deductions and other spending activities allegedly resulting in his present insolvency and inability to satisfy Yale's judgments against him in this case." A schedule of GTI's secured and unsecured transactions between the end of 1987 and February 29, 1988, gave Yale reason to believe that GTI was wrongly liquidating secured assets, as well as dismantling GTI through corporate transfers.[38]

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[37] We recognize that the magistrate judge considered the fact that Yale had other avenues with which to collect its claims. We find, however, that Yale was reasonable to think its claims nevertheless would be inadequately protected. For example, even though Yale had received a personal guaranty from Baeza, Sr., Baeza, Sr.'s statements to Thornborough gave it reason to believe that Baeza, Sr. would make this protection inadequate. Indeed, hindsight reveals that Baeza, Sr. did just that. After judgment was entered against him in the lawsuit, Baeza, Sr. declared his own insolvency despite a personal net worth of over five million dollars as recently as 1992. In addition, Baeza, Sr. made numerous fraudulent transfers to avoid the May 7, 1993

[38] Moreover, Yale had reason to believe that possible preference payments or possible fraudulent transfers were being made from GTI to GTI insiders. For example, on or between January 5 through January 7, 1988, GTI cashed three $100,000 certificates of deposit (CDs) which served to collateralize a loan from Ocean Bank. At trial, Yale presented evidence which gave it reason to believe that almost immediately after the CDs were cashed, GTI distributed the proceeds to Baeza, Sr. and his sons, Baeza, Jr. and Javier Baeza, and that the new CDs

That schedule revealed numerous transfers of large amounts of money, in multiples of at least $10,000, to GTI insiders and to non-insider, unsecured trade creditors. Of particular concern to Yale was the transfer of approximately $280,000 to Ocean Bank between January 5, 1988, and January 28, 1988.

Yale's counsel, Harold Moorefield, Jr,. testified that, based on his experience and research, many of the payments reflected in GTI's books constituted preference payments to non-insider creditors which could only be recovered by a bankruptcy proceeding.[39] Under the Bankruptcy Code, a trustee may avoid any non-insider preference payment made by a debtor only if the transfer of interest was made on or within 90 days before the date of filing of the petition. 11 U.S.C. § 547(b)(4)(A). Thus, Yale's decision to file the petition was partly motivated by a well-founded belief that it needed to fall within the 90 day preference period to enable it to reach back and recover money transferred by GTI to non-insiders.[40]

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were repledged in Baeza, Sr. and his sons' names to Ocean Bank. This was significant to Yale because Ocean Bank was no longer a secured creditor of GTI, and the payments by the Baezas to Ocean Bank potentially could be recovered as preference payments to a non-insider. See note 39, *infra*, for a discussion of what constitutes a preference payment.

[39] A preference payment is a transfer for the benefit of a creditor for or on account of an antecedent debt made on or within 90 days of the filing of the petition, where the transfer enables the creditor to receive more than it would be entitled to under a Chapter 7 proceeding. 11 U.S.C. § 547(b); *In re Jet Florida Systems, Inc.*, 861 F.2d 1555 (11th Cir.1988).

[40] In contrast to the 90 day time limit for creditors to recover preference payments to non-insiders, preferential transfers to insiders may be voided for up to one year prior to filing the petition. 11 U.S.C. § 547(b)(4)(B). On appeal, GTI argues that the appropriate "reach back" period to avoid transfers to Baeza, Sr. or his sons would have been one year, rather than 90 days, as a result of Yale's personal guaranty from Baeza, Sr. While such transfers may have been avoidable preference payments for up to one year, not all of the transfers with which Yale was concerned were made to insiders.

Finally, we think Yale was legally justified in filing the involuntary petition, as Yale had a reasonable basis in the law to think its petition would not be dismissed. The bankruptcy court's opinion indicates that Yale's petition was dismissed because it found that GTI was solvent; as a solvent debtor, GTI did not fall within the intendment of 11 U.S.C. § 303(h)(1), which allows courts to order relief in an involuntary proceeding only if the debtor is "generally not paying" its debts as they become due.[41] In determining GTI's solvency, the bankruptcy court excluded Yale's claims against GTI because it found those claims to be subject to a "bona fide dispute."[42] It is clear from the face of the bankruptcy court's opinion that, if Yale's claims had not been excluded as subject to a bona fide dispute, Yale would not have lost on the issue of whether GTI was generally not paying its debts;[43] as such, § 303(h)(1) would have been inapplicable and the bankruptcy court would not have been required to dismiss the petition.[44]

We want to underscore that Yale had a good faith basis in law and fact in believing that its petition would not be

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[41] In determining whether a debtor is generally paying its debts as they become due, courts "compare the number of debts unpaid each month to those paid, the amount of the delinquency, the materiality of the non-payment, and the nature of the [d]ebtor's conduct of its financial affairs." *In re Leek Corp.*, 52 B.R. 311, 314 (Bankr.M.D.Fla.1985). Yale was GTI's dominant creditor. Because a significant percentage of GTI's debts were to Yale, clearly the exclusion of Yale's debts was critical to the bankruptcy court's solvency determination.

[42] Section 303(h)(1) excludes debts which are the subject of a bona fide dispute from a court's determination of whether a debtor is "generally not paying" its debts as they become due. In addition, § 303(b)(1) of the Bankruptcy Code provides that claims raised in an involuntary petition cannot be subject to a bona fide dispute.

[43] We note that the district court's decision affirming the bankruptcy court's dismissal also reflects this reasoning.

[44] We note that GTI's expert witness, Mark Bloom, agreed with this reading of the bankruptcy court's order of dismissal.

dismissed as a result of the existence of a bona fide dispute. Upon reviewing the bankruptcy court's order of dismissal, the district court recognized that "bona fide dispute" is not defined in the Bankruptcy Code, that no binding decision on this question exists, and that courts have used divergent tests to define this term. At issue was whether Yale's claims in the involuntary petition as well as the counterclaims it asserted in the district court, were separate from the claims asserted by GTI in its lawsuit in the district court. The district court affirmed the bankruptcy court's finding of a bona fide dispute.[45]

While we need not decide whether the district court's finding of a bona fide dispute was error,[46] we recognize that, in making its finding, the bankruptcy court, as well as the district court on review, chose not to follow a line of authority which holds that counterclaims only serve to diminish or set off the amounts owing on a claim, and do not render a petitioner's claim subject to a bona fide dispute. *See In re Atwood*, 124 B.R. 402, 409 (S.D.Ga.1991) (quoting *In re Drexler*, 56 B.R. 960, 969 (Bankr.S.D.N.Y.1986)) ("Generally, "the debtor's assertion of a counterclaim, even if of substance, does not render the petitioner's claim the subject of a bona fide dispute.' "); *In re Onyx Telecommunications, Ltd.*, 60 B.R. 492, 495 (Bankr.S.D.N.Y.1985); *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268, 270 (8th Cir.1955). If the courts below had followed this line of cases, the counterclaims asserted by Yale in GTI's lawsuit very likely would not have rendered Yale's claims in bankruptcy subject to a bona fide dispute. Assuming arguendo that those courts were correct in not following the

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[45] The district court found the existence of a bona fide dispute under a standard different from the one used by the bankruptcy court. We express no opinion on the different standards applied by the courts below.

[46] As we state *infra*, we decline to resolve the issue of whether the district court erred in affirming the bankruptcy court's dismissal of Yale's petition because the issue may be moot.

above cases, the fact remains that Yale had a good faith and reasonable basis under the law to believe that its claims were not subject to a bona fide dispute. If either the bankruptcy court or the district court had been persuaded by the authority cited by Yale, it is probable that Yale's involuntary petition would not have been dismissed. Of course, if the petition was not dismissed, Yale could not under the Bankruptcy Code have been subject to the bad faith inquiry. *See* 11 U.S.C. § 303(i)(2). To hold Yale liable because it lost the bona fide dispute argument would be inappropriate.

Because the evidence overwhelmingly indicates that Yale had more than sufficient reasons to file the involuntary petition, and because Yale had a good faith basis in believing its petition would not be dismissed as a result of its claims being subject to a bona fide dispute, we reverse the magistrate judge's bad faith finding.

D. *Whether it was error for the district court to affirm the bankruptcy court's dismissal of the involuntary bankruptcy petition.*

From the representations made at oral argument, it appears likely that the issue of the bankruptcy court's dismissal of Yale's involuntary bankruptcy petition is moot. We therefore decline to resolve the issue. Should any party desire, the issue may be pursued by first seeking a resolution of the mootness issue in the district court. Then a new appeal to this court may be taken.

VI. *CONCLUSION*[47]

For the foregoing reasons, we affirm the magistrate judge's May 23, 1994, order establishing that the original parties as well as the new transferees consented to proceed before him; we vacate the magistrate judge's finding that GTI's transfer of its assets and inventory to Power Depot was not fraudulent; and, finally, we reverse the magistrate judge's finding that Yale filed the involuntary bankruptcy petition against GTI in bad faith.

AFFIRMED IN PART, VACATED IN PART, and REVERSED IN PART.

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[47] The motions challenging jurisdiction, which were carried with the case, are resolved in Part V(A) of this opinion.

APPENDIX B

Judge Sidney M. Weaver. By that time, TCM had obtained another forklift dealer in the South Florida Area.

49. On October 18, 1988, Yale sold at auction all forklifts and parts seized pursuant to the replevin order eight months earlier. GTI was given notice that auction and purchased certain Yale parts at that time.

II. CONCLUSIONS OF LAW

1. GTI and Yale have brought suit against each other alleging numerous causes of action resulting from Yale's termination of the DMA in 1987. Specifically, GTI sues Yale in its First Amended Complaint for breach of the DMA by wrongful termination of the agreement; breach of fiduciary duty; tortious interference with its business relations with TMC; failure to dispose of secured collateral in a commercially reasonable manner; and wrongful filing of the involuntary bankruptcy petition.

2. Yale has responded by asserting numerous counterclaims against GTI, Gonzalez Trading and the Baeza counterdefendants, individually[2]. Briefly stated, Yale alleges GTI's breach of the DMA, through submission of false special pricing and warranty claims and by failing to pay amounts when due; fraudulent conveyance of secured collateral and corporate assets; failure to

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[2] On December 29, 1988, the Court granted counterdefendant Jose M. Baeza, Jr.'s, motion for severance on Count III of the counterclaims and ordered that trial on issues involving this counterdefendant would be conducted following the trial of the main case. Accordingly, Yale shall have the right to request a trial date for this party within thirty (30) days of the dated of this Memorandum Opinion and Order.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 88-0061-CIV-ZLOCK/BANDSTRA

GENERAL TRADING, INC.
a Florida corporation,

Plaintiff,

vs.

YALE MATERIALS HANDLING
CORPORATION, a Delaware corporation,

Defendant.

YALE MATERIALS HANDLING CORPORATION,
a Delaware corporation,

Counterclaimant,

v.

GENERAL TRADING, INCORPORATION a Florida corporation, GONZALEZ TRADING, INC. a foreign corporation, and JOSE M. BAEZA, SR. JOSE M. BAEZA, JR. and JAVIER BAEZA, individuals,

Counterdefendants.

AMENDED FINAL JUDGMENT

THIS action came on for proceedings before the Court, Honorable Ted E. Bandstra, United States Magistrate Judge, presiding and the issues having been duly tried and heard pursuant to, among other things, Rule 63, Fed.R.Civ.P., as amended, a decision having been duly rendered in accordance

with the Memorandum Opinion and Order dated September 30, 1992, and the Court having considered the amounts due the respective parties in accordance with the Memorandum Opinion, it is hereby ORDERED and ADJUDGED as follows:

1. Final judgment is hereby entered in favor of General Trading, Inc. and against Yale Materials Handling Corporation on Count VI of the First Amended Complaint in the amount of $500,000, representing punitive damages awarded under 11 U.S.C. §303(i)(1)(B), plus attorneys' fees and costs in the amount of $86,777 awarded pursuant to 11 U.S.C. S 303(i)(1)(A) and (B), together with post-judgment interest thereon at the rate of 3.24% per annum.

2. Final judgment is hereby entered in favor of Yale Materials Handling Corporation and against General Trading, Inc. and Jose Baeza, Sr., jointly and severally, on Counts V, XIX, XXII and XXIII of Yale's First Amended Counterclaim in the total amount of $1,139,528, representing all damages incurred by Yale Materials Handling Corporation with prejudgment interest calculated through January 15, 1993, together with post-judgment interest thereon at the rate of 3.24% per annum.

3. All other claims of the parties are dismissed with prejudice.

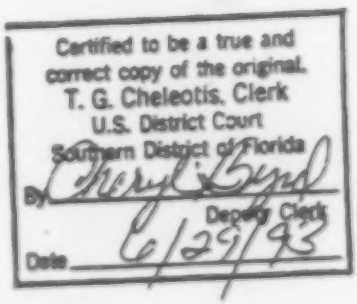
4. The Court shall retain jurisdiction to consider any motions for attorneys' fees and costs as may be appropriate which shall be filed within thirty (30) days of the entry of this judgment, pursuant to Rule 10.F of the Local Rules of this Court.

DONE AND ORDERED in Chambers, at Miami, Florida, this 25th day of April, 1993.

Ted E. Bandstra
United States Magistrate Judge

Copies furnished to:

All counsel of record



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No. 97-1239

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1997

GONZALEZ TRADING, INC. and JOSE M. BAEZA, JR.,

Petitioners,

vs.

YALE MATERIALS HANDLING CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant the petition for a writ of certiorari to address Petitioners' claim that they did not consent to proceed before a magistrate judge where the issue of consent was resolved by the district court and affirmed by the court of appeals based upon "ample evidence" of actual consent and applying established law.

PARTIES TO THE PROCEEDING

The original parties to the proceeding in the district court were General Trading, Inc. and Yale Materials Handling Corporation (Yale). Yale added the following parties as counterclaim defendants: Jose M. Baeza, Sr., Jose M. Baeza, Jr., Gonzalez Trading, Inc. and Javier Baeza. The following parties were added in post-judgment proceedings in the district court as transferees or garnishees: Power Depot, Inc., Michele M. Baeza, Encarnacion Gonzalez, Ocean Bank of Miami, First Florida Savings Bank, Barnett Bank of Broward County, N.A., Joe's Rental, Inc., America Discount, Inc., G.T. Americas, Inc., G.T. Corp., Franchel Enterprises, Inc., Gary Gerrard, P.A., GTE International, Inc., Compania Dominicana de Telefonso and Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

The parties to the proceedings in the Eleventh Circuit were General Trading, Inc., Jose M. Baeza, Sr., Jose M. Baeza, Jr., Gonzalez Trading, Inc., Javier Baeza, Power Depot, Inc., Michele M. Baeza, Encarnacion Gonzalez and Yale Materials Handling Corporation.

The parent company of Respondent Yale Materials Handling Corporation is NACCO Industries, Inc.

Yale Materials Handling Corporation has the following nonwholly owned subsidiaries: Sumitomo-Yale Company, Ltd., Shanghai Hyster Forklift Truck Company, Ltd., Hyster New England, Inc., NACCO Materials Handling S.R.L.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 25-65) is reported at 119 F.3d 1485.

STATUTE AT ISSUE

This case involves the application of 28 U.S.C. § 636(c), which provides that a civil action may, upon consent of the parties, be referred to a United States Magistrate Judge.

STATEMENT OF THE CASE

Petitioners Jose M. Baeza, Jr. (Baeza Jr.) and Gonzalez Trading, Inc. (Gonzalez) seek to have this Court make factual findings contradicting the unanimous findings of the magistrate judge, the district judge and the court of appeals panel that Petitioners did consent to proceed before the magistrate judge. The petition should be denied because the issue of consent was resolved based upon "ample evidence" of actual consent, and the Eleventh Circuit's decision merely applied established law to the factual findings.

As repeatedly determined below, Petitioners themselves proposed and willingly consented to the referral to the magistrate judge, and thereafter they knowingly and actively litigated before him without objection, until he made a series of decisions adverse to them. Only then did Petitioners, and numerous other parties to this action who have finally recognized reality and not sought review by this Court, first concoct the specious argument through new counsel that they and their prior counsel never had consented to the authority of the magistrate judge. After an exhaustive review of the extensive record, the Eleventh Circuit found this argument of appellants' new counsel "incredulous." *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496 (11th Cir. 1997).

The case does not present a conflict with a decision of any other court of appeals or of this Court. The record does not present any question of jurisprudential significance. At most, Petitioners have asserted that the Eleventh Circuit's decision to affirm both trial court judges and to reject Petitioners' disingenuous, *ex post facto* claims of lack of consent was premised on factual error. Such an assertion is not legitimate and does not present an issue warranting the exercise of this Court's discretionary jurisdiction.

A. Yale Prevails On The Merits.[1]

This case began in 1987 as a termination dispute between Respondent Yale Materials Handling Corporation (Yale), a manufacturer of forklift trucks, and its former dealer, General Trading, Inc. (GTI), following Yale's discovery of repeated acts of fraud by GTI. Yale also asserted counterclaims against GTI's owner, Jose M. Baeza, Sr. (Baeza Sr.), his two sons, Javier Baeza and Baeza Jr., and the Baezas' Puerto Rico company, Gonzalez, for fraudulent conveyances to avoid Yale's security interests and for damages under various theories.[2] Prior to trial, Yale's claim against Baeza Jr. was severed from the litigation for separate trial, but Baeza Jr. remained a party and participated in pre-trial and post-trial proceedings through his various attorneys.

A bench trial was held before District Judge Scott for 13 trial days over five separate sessions during the summer of 1990. In August 1990, with less than one day of trial remaining, Judge Scott *sua sponte* continued the trial to an undetermined later date and then abruptly resigned from the bench. The case was

1. Petitioners have omitted or misstated much of the procedural history of this case.

2. GTI, Baeza Sr., Javier Baeza, Baeza Jr. and Gonzalez are sometimes referred to herein as "counterdefendants."

reassigned to two successive district court judges and eventually was transferred over a year later to a fourth, District Judge William J. Zloch.

All of the parties were desirous of completing the trial as soon as possible. Judge Zloch candidly informed them that, notwithstanding the tortuous history of the case, his criminal docket precluded a civil trial by him for the foreseeable future. As a response to that dilemma, Petitioners' own trial counsel proposed completion of the trial before a magistrate judge, and all parties readily consented. The record shows confirmation of the consents by an order of Judge Zloch (with a seven day opportunity to withdraw consent) and thereafter at an oral hearing before Magistrate Judge Bandstra.

The trial was resumed before Magistrate Judge Bandstra on February 10, 1992. At its conclusion, Yale was awarded a judgment on its counterclaims against GTI and Baeza, Sr., and GTI was awarded a judgment against Yale on a bankruptcy issue (which now has been reversed by the court of appeals and has not been raised in the petition for certiorari). GTI and Baeza Sr. at first appealed the magistrate judge's decision on the merits, but they later abandoned any challenge to that decision.

B. Yale Obtains Additional Post-trial Judgments.

After entry of judgment on the merits, Yale, GTI and Baeza Sr. filed motions seeking attorneys' fees. On October 18, 1993, the magistrate judge issued a judgment awarding Yale its attorneys' fees and costs.

Yale's efforts to execute on its judgments soon revealed that Baeza Sr., with the assistance of his family, was engaged in an effort to make himself and GTI judgment proof. Supplemental proceedings in aid of execution were pursued in

the trial court, and the magistrate judge impleaded supplemental defendants Michele M. Baeza, Encarnacion Gonzalez and Power Depot, Inc. (Power Depot).[3] After conducting a lengthy evidentiary hearing, Magistrate Judge Bandstra entered, on April 12, 1994, further final judgments in favor of Yale and set aside various fraudulent transfers that had been made to Baeza Jr., Gonzalez, Javier Baeza, Michele Baeza and Encarnacion Gonzalez.[4]

C. Petitioners Raise The "Lack Of Consent" Issue.

After the entry of the magistrate judge's decision in the supplementary proceedings, virtually all of the counterdefendants and transferees fired their former counsel and engaged various new counsel. Initially, all of the counterdefendants and transferees filed motions for a new trial in connection with the supplementary proceedings. However, on April 8, 1994, Javier Baeza, Michele Baeza, Encarnacion Gonzalez and Power Depot filed a "Special Appearance for Purposes of Withdrawing Motions for Partial New Trial." In that document, each of those parties expressly accepted the judgments entered by the magistrate judge.

Shortly after expressly accepting the judgments against them, Javier Baeza, Michele Baeza, Encarnacion Gonzalez and Power Depot apparently shifted course a third time and filed another "special appearance" for the purpose of contesting the magistrate judge's jurisdiction. Similar motions were filed on behalf of GTI, Baeza Sr., Gonzalez and Baeza Jr. In these

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3. Michele Baeza, Encarnacion Gonzalez and Power Depot are sometimes referred to herein as the "transferees."

4. None of the parties challenged these judgments for Yale on appeal.

motions, those parties contended, for the first time, that they had not consented to anything that would have permitted the entry of the magistrate judge's final judgment on the merits, the final judgment on attorneys' fees and costs, the final judgments in the supplementary proceedings or any other order.

D. The Magistrate Judge, The District Court Judge And The Eleventh Circuit Reject Petitioners' Arguments.

On May 23, 1994, the magistrate judge entered an order denying the motions to vacate the judgments and orders he had entered. In that order, the magistrate judge found, *inter alia*, that each of the parties had actually consented to his exercise of Section 636(c) authority; that all were represented by counsel and had fully participated in the proceedings; and that none had raised any objection but all had waited until after the entry of the adverse judgments and orders to begin questioning the court's authority.

Contemporaneous with their raising of the "consent" issue with the magistrate judge, Gonzalez and Baeza Jr. also filed separately with the district judge a "Motion to Vacate Order of Referral." On October 24, 1994, District Judge Zloch entered an order dismissing the motion of Gonzalez and Baeza Jr., finding as a matter of fact that "there was explicit, voluntary consent by all of the parties to the above-styled cause, and that their consent was clear and unambiguous."

The counterdefendants and transferees filed a mandamus petition in the court of appeals and also appealed from both the magistrate judge's and the district court judge's orders denying their motions to vacate the judgments, all based on the alleged absence of consent.[5]

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5. The appeal from the district court's order was dismissed by the court of appeals for lack of jurisdiction on August 21, 1995, because the issues addressed by the district court were already the subject of the parties' pending appeals.

The Eleventh Circuit consolidated all of the pending appeals and entered its decision on August 22, 1997. On the consent issue, the court of appeals stated:

> After carefully reviewing the record, we readily conclude that there is ample evidence that GTI, Baeza, Sr., Gonzalez Trading, and Baeza, Jr. explicitly and unambiguously consented to appear before the magistrate judge.

119 F.3d at 1495. The court of appeals cited the following undisputed facts:

- The attorneys for these parties attended a status conference on November 20, 1991, where they presented to the magistrate judge a signed consent and stipulation to proceed before the magistrate judge to complete the trial. 119 F.3d at 1495.

- Baeza Jr.'s attorney acknowledged on the record at the November 20, 1991 status conference that her client consented to the proceedings before the magistrate judge. *Id.*

- With all parties represented at the November 20, 1991 status conference, the magistrate judge stated on the record that "apparently there is an agreed consent to have this case now to be completed . . . before me. Is that correct?" Without objection or contradiction by counsel for Petitioners, Yale's attorney answered in the affirmative, clearly expressing the view of all present. *Id.*

- The parties were directed by the district court, in its order of referral of the case to the magistrate judge, to file any objection to the order of referral within seven days. No party objected. *Id.*

- All of the parties participated in pre-trial and post-trial proceedings without objecting to the magistrate judge's authority. No objection was raised until May 1994, over two years after the conclusion of the trial, when Petitioners' fraudulent scheme began to unravel as the magistrate judge entered judgments setting aside fraudulent conveyances among the counterdefendants and transferees. 119 F.3d at 1496.

The court of appeals similarly had no trouble finding that the transferees had consented through their filing of a formal, written acceptance of judgment. The court of appeals found that these parties' express consent was "[c]learly encompassed" in the acceptance of judgment. 119 F.3d at 1496.

REASONS FOR DENYING THE WRIT

Petitioners raise no issue worthy of consideration by this Court. This case presents neither a conflict among the circuits nor an important jurisprudential issue. The issue raised by Petitioners was resolved based on the "ample evidence" of consent and on well-settled legal principles.

I.

THE ELEVENTH CIRCUIT DID NOT RELY ON ESTOPPEL OR WAIVER THEORIES TO FIND THAT PETITIONERS CONSENTED TO PROCEED BEFORE A MAGISTRATE JUDGE.

Petitioners incorrectly contend that, because the Eleventh Circuit referred to their failure to object to the magistrate judge during the course of the proceedings, the decision of the court of appeals was premised on theories of "estoppel" or "waiver." In fact, the court of appeals made clear in its opinion that it did not need to reach the issue of whether a failure to object constitutes a waiver of the consent requirement. The court of appeals stated at footnote 21 (119 F.3d at 1496):

> Because the parties clearly consented to the authority of the magistrate judge, we do not decide today the issue of whether a failure to object to the magistrate judge results in waiver of the consent requirement of § 636(c).

The court of appeals' decision was based solely on the ample evidence of consent — a factual determination that did not require the court of appeals to consider theories of estoppel or waiver.

In its opinion, the Eleventh Circuit cited *Peretz v. United States*, 501 U.S. 923 (1991), which held that a district court could lawfully delegate a felony *voir dire* proceeding to a magistrate judge under Section 636(b)(3), if the defendant failed to object. 501 U.S. at 935-37. Yale argued below in the alternative that, under *Peretz*, Petitioners' failure to object to the referral to the magistrate judge, when expressly invited to do so by the district judge's referral order, amounted to consent under Section

636(c). But the Eleventh Circuit did not reach that issue, finding express consent as a matter of fact from the record evidence. Therefore, Petitioners' claim that the Eleventh Circuit predicated federal subject matter jurisdiction on theories of estoppel and waiver is incorrect. That issue was not decided by the court of appeals.

II.

PETITIONERS' CLAIM THAT THERE WAS NOT A FINAL ORDER IS MERITLESS AND WAS NOT RAISED BELOW.

Petitioners contend here, for the first time in this litigation, that the magistrate judge's decision to sever Baeza Jr. for purposes of trial renders the judgments below non-final and invalidates his consent. The argument was not made in the court of appeals, or in any pleading to the magistrate judge or district court. Accordingly, it has been waived and should not be considered by this Court. *See Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992); *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, it defies logic for Petitioners now to question the finality of the judgments below. This is their appeal. Having taken an appeal from the judgments entered against them and prosecuted it in the Eleventh Circuit, Petitioners clearly acknowledged the finality of those judgments. They cannot undo the court of appeals' decision by now claiming their own appeal was defective.

III.

THE RESULT IS FAIR

Having asserted no legitimate basis to question the Eleventh Circuit's decision on the law or facts, Petitioners argue that the decision was fundamentally unfair. The argument is patently groundless.

As established below, Petitioners, along with the other counterdefendants and transferees in the same family, defrauded Yale. When Yale asserted claims to recover its losses from business transactions, Petitioners themselves sought a referral to the magistrate judge, willingly consented, and knowingly and actively litigated before him. When they lost on the merits, Petitioners attempted to avoid the judgments through fraudulent conveyances that were set aside by the magistrate judge. When their efforts to stymie the judicial process were finally defeated, they hired new lawyers who then disingenuously tried to rewrite the litigation's history by asserting that there never had been consent to the magistrate judge. Those *ex post facto* attacks by inventive, if unscrupulous, counsel were thoroughly denounced and rejected by the magistrate judge, the district court judge, and ultimately the Eleventh Circuit, which found "ample evidence" of "clear and unambiguous consent."

Through their unsavory tactics employed over ten years of litigation, Petitioners have managed to avoid paying for their perpetual and accumulated fraudulent conduct. The Eleventh Circuit's decision is, by any measure, entirely fair.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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